NO. 42747-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MHN GOVERNMENT SERVICES, INC.; HEALTH NET, INC., and MHN SERVICES dba MHN SERVICES CORPORATION, a Washington corporation,
Appellants,

v.

BARBARA BROWN and CINDY HIETT,
Respondents.

BRIEF OF APPELLANTS

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I. INTRODUCTION

Respondents, who are sophisticated, licensed professionals, agreed to a consulting agreement (the "PSTOA") with Petitioner MHN Government Services ("MHNGS") that gave them the opportunity to provide counseling services to military members and their families. The PSTOA includes an Arbitration Agreement that covers any "claim in tort, contract, or otherwise." The Arbitration Agreement was not hidden and it incorporates rules and procedures developed by the American Arbitration Association ("AAA"), a widely respected neutral third-party organization. The provisions in the Arbitration Agreement are bilateral in nature, and afford the parties a fair, neutral and efficient process to resolve their disputes, whatever their nature, whether it would be a fraud action against Respondents (if they had misrepresented their professional credentials, for example), or the claims Respondents have asserted here—that they were improperly classified as independent contractors. Yet, the Superior Court refused to enforce the Arbitration Agreement, concluding that it is unconscionable.

In reaching this conclusion the Superior Court misinterpreted recent U.S. Supreme Court authority, as well as applicable California law—which governs the PSTOA. The U.S. Supreme Court has been unwavering: the Federal Arbitration Act ("FAA") preempts any law, state

or federal, that impedes the fundamental purpose of arbitration, which is to afford parties an efficient procedure to resolve their disputes. While acknowledging one recent U.S. Supreme Court decision—AT&T Mobility v. Concepcion, the Superior Court held that Concepcion did not apply to the case at hand because this case does not involve a class arbitration waiver. The Superior Court erred. Rather than reading Concepcion as narrowly as it did, the Superior Court should have followed U.S. Supreme Court precedent in this area and sought to enforce the Arbitration Agreement, as opposed to looking for ways to find it unenforceable – or in this instance unconscionable. Through the lens of U.S. Supreme Court precedent, as well as applicable Washington state and California authority, it is clear that the Arbitration Agreement is enforceable and were there any doubt about the enforceability of any of its provisions, the lower court should have severed those provisions and ordered this case to arbitration.

II. STATEMENT OF ERROR

Issue No. 1: Did the Superior Court err when it applied state law unconscionability principles in contravention of the FAA when determining that the parties' Arbitration Agreement was unconscionable?

Issue No. 2: Even if certain provisions in the parties' Arbitration Agreement were unconscionable, did the Superior Court err when it

refused to sever those provisions and enforce the Arbitration Agreement without those provisions?

III. STATEMENT OF THE CASE

A. Statement of Facts

1. MHNGS Recruited Respondents Who Are Sophisticated, Licensed Professionals to Join Its Consultant Network.

MHNGS contracts with the U.S. Department of Defense ("DOD") to provide military service members and their families with access to a network of highly experienced, licensed service providers ("Consultants") who offer confidential life-skills counseling services. CP 35. To meet the DOD's growing demand for Consultants, MHNGS recruits licensed individual practitioners and invites them to join its Consultant network. CP 35-42.

Respondent Barbara Brown ("Brown"), a Licensed Clinical Social Worker ("LCSW"), and Respondent Cindy Hiett ("Hiett"), a Licensed Marriage Family Therapist ("LMFT"), both received recruiting letters from MHNGS. CP 33, 53, 99, 109. Apparently during all relevant times, Hiett has been a California resident and Brown lives in Washington. CP 34, 54, 71. In Washington, an Independent Clinical Social Worker license requires a master's or doctoral social work degree from a school accredited by the Council on Social Work Education, a minimum of 4,000

hours of supervised experience, and completion of the clinical exam administered by the American Association of State Social Work Board. WAC 246-809-320. A California Marriage and Family Therapist license requires a master's or doctor's degree, 3,000 hours of supervised work experience, course work in subjects such as psychopharmacology, etiology of substance abuse and addiction, and statutory and regulatory laws surrounding psychotherapeutical practice, and completion of the LMFT Standard Written Examination. Cal. Bus. & Prof. Code §§ 4980.36, 4980.37, 4980.41, 4980.43.

The letters that MHNGS sent to Respondents presented them with a variety of short-term opportunities to provide their professional services, including "rotational assignments" lasting an average of 45 days and "on demand assignments" lasting only one to three days. CP 38, 58.

Respondents were not actively seeking Consultant positions when they received the recruiting letters. CP 33, 53. In fact, at the time they received their recruiting letters, Respondent Brown operated her own practice as a "sole proprietor," CP 99, and Respondent Hiett was already a contracted provider in the behavioral health network of MHN—a related organization under the Health Net, Inc. umbrella, which provides managed behavioral healthcare benefits and Employee Assistance Programs. CP 53. See http://www.mhn.com/content/why-mhn (last visited Mar. 9,

2012). Nevertheless, Respondents expressed an interest in participating. CP 54. MHNGS, therefore, conducted short interviews with them by phone and sent them each a PSTOA to review and consider. CP 34, 54. Both signed the PSTOA and returned it as drafted. CP 34, 54.

2. The PSTOA Contains an Express Mandatory Arbitration Agreement.

Included in the PSTOA is an express mandatory arbitration agreement ("Arbitration Agreement" or "Agreement"). CP 97. The Agreement states, *inter alia*: "The parties agree that any controversy or claim arising out of or relating to this [PSTOA] . . . or the breach thereof, whether involving a claim in tort, contract or otherwise, shall be settled by final and binding arbitration in accordance with the provisions of the American Arbitration Association." The PSTOA also provides that it shall be governed and construed according to California law. Id.

As the Superior Court acknowledged, "this was not a mandatory arbitration clause that was hidden in some fashion." RP 40. The Agreement is "a rather large paragraph on page 7 of the agreement" and "the caption of '**Mandatory Arbitration**' is bolded and underlined." Id. (emphasis added). Thus, "it's not something that would be hidden away in a multi-page contract." Id.

3. The Arbitration Agreement Streamlines the Dispute Resolution Process in a Fair and Efficient Manner.

The Agreement contains several provisions to streamline the dispute resolution process, to reduce uncertainty, and to reduce the likelihood of entanglements in procedural disputes, thereby saving both parties time and cost.

For example, it provides that the arbitration is to be conducted in accordance with the AAA rules (the "AAA Rules"). CP 97. The AAA is "the nation's largest full-service alternative dispute resolution (ADR) provider." AAA, http://www.adr.org/drs (last visited Mar. 9, 2012). It is a "not-for-profit, public service organization" offering multiple ADR resources, including a "panel of neutral arbitrators and mediators, the AAA rules, case administration services, as well as education and training services." AAA, http://www.adr.org/aaa_mission & http://www.adr.org/drs (last visited Mar. 9, 2012). These resources are aimed at "provid[ing] cost-effective and real-world solutions to counsel, business and industry professionals, employees and government agencies, as well as consumers." AAA, http://www.adr.org/drs (last visited Mar. 9, 2012).

For example, the AAA Rules provide a procedure for selecting neutral arbitrators: "[u]pon the request of any appointing party, the AAA

shall submit a list of members of the National Roster." AAA, Commercial Arbitration Rules, http://www.adr.org/sp.asp?id=22440#12, R-12 (last visited Mar. 9, 2012).[1] The AAA Rules also state that "[a]ny arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith." Id., R-17. As to locale, the AAA Rules state: "The parties may mutually agree on the locale where the arbitration is to be held. . . . If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale." Id., R-10. The AAA Rules also provide guidance regarding the scope of the award, indicating that, "[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties." Id., R-43. This includes an apportionment in the final award of "fees, expenses, and compensation . . . in such amounts as the arbitrator determines is appropriate," including interest and "an award of attorneys' fees if . . . it is authorized by law." Id.

The Arbitration Agreement here provides that a "single, neutral arbitrator . . . licensed to practice law" will "conduct the arbitration."

[1] Respondents argued below that the Agreement is unclear because it does not specify whether the AAA Commercial Rules or the AAA Employment Rules should apply. However, the distinction is inconsequential because the differences between the sets of rules are negligible. See AAA Commercial Arbitration Rules, http://www.adr.org/sp.asp?id=22440 (last visited Mar. 9, 2012); AAA Employment Arbitration Rules, http://www.adr.org/sp.asp?id=32904 (last visited Mar. 9, 2012). In any event, insofar as the Agreement expressly states it is creating an independent contractor relationship, it is evident that the Commercial Rules would apply.

CP 97 (emphasis added). The Agreement also provides detail regarding the specific number of potential arbitrators to be selected from the AAA's roster, indicating that "MHN shall provide [the Consultant] with a list of three neutral arbitrators from which [the Consultant] shall select its choice of arbitrator for the arbitration." Id. (emphasis added). Thus, after MHNGS requests from the AAA a list of three neutral arbitrators, the Consultant, not MHNGS, has control over the final selection of a neutral arbitrator.

4. The Agreement Applies Equally to Both Parties.

The Agreement provides equal benefits to both sides, as it applies to all controversies or claims arising out of or relating to the PSTOA, whether involving a claim in tort, contract, or otherwise. Id. So, if MHNGS had a fraud claim against one of the Respondents—for misrepresenting their professional credentials, for example—Respondents could also invoke the Arbitration Agreement and take advantage of its procedures.

5. There Is No Evidence in the Factual Record That Respondents Misunderstood or Were Coerced into Signing the PSTOA or the Arbitration Agreement.

Respondents presented no evidence that they misunderstood or were coerced into signing the PSTOA or its clearly delineated "**Mandatory Arbitration**" Agreement. Respondents' declarations filed in

support of their position are completely silent on these issues. CP 33-34, 53-54. Respondents simply noted that (1) they received solicitations from MHN recruiting them into the MFLC program; (2) they completed paperwork regarding their background and availability; (3) they received a "form contract" (the PSTOA) in the mail, which they signed and returned to MHNGS; (4) "[t]here was no discussion or negotiation of the terms of this contract . . . and no such communications were ever invited by MHNGS; and (5) "[t]he contract was offered on a take-it-or-leave it basis." CP 33-34, 53-54.

Absent from Respondents' declarations is any mention of whether they misunderstood any terms of the agreement (including the reference to the AAA rules), disagreed with the Agreement, attempted to change any provisions in the Agreement, or asked any MHNGS representatives if they could do so. CP 33-34, 53-54. They also did not claim that they were pressured to sign the Agreement or that they had insufficient time to review it carefully before signing it. CP 33-34, 53-54. Furthermore, they presented no evidence that contracting with MHNGS was their only reasonable business opportunity at the time. CP 33-34, 53-54. To the contrary, Respondent Brown represented when she applied with MHNGS that she was a "sole proprietor," and Respondent Hiett was providing her services as part of the MHN provider network. CP 53, 99.

B. Statement of Procedure

Respondents initially brought a putative class action in Pierce County Superior Court claiming that they were entitled to overtime pay under Washington's Wage Hour Act, RCW 49.46 *et seq*. Brown v. MHN Govt. Servs., Inc., No. 11-2-08582-7, Dkt. No. 1. After determining that the amount in controversy as pled by Plaintiffs exceeded the threshold for class action removal, Petitioners timely removed the action to the United States District Court for the Western District of Washington. Brown v. MHN Govt. Servs., Inc., No. 3:11-cv-05400, Dkt. No. 1. Following removal, Respondents dismissed their case. Id., Dkt. No. 17. They again filed a complaint in Pierce County Superior Court, this time expressly waiving on behalf of themselves and the putative class recovery of any amount in excess of $4,999,999, excluding interest and costs. CP 9.

Given that Respondents had signed the Arbitration Agreement, MHNGS moved to compel arbitration. CP 72-87. Respondents, however, opposed arbitration, and filed a separate motion to quash arbitration, arguing that the Arbitration Agreement is unenforceable. CP 11-32. Specifically, they claimed that the following provisions are unconscionable:

(1) Venue: "[T]he arbitration shall be conducted in San Francisco, California."

(2) Arbitrator Selection: "MHN shall provide Provider with a list of three neutral arbitrators from which Provider shall select its choice of arbitrator for the arbitration."

(3) Initiation of Arbitration: "Arbitration must be initiated within 6 months after the alleged controversy or claim occurred by submitting a written demand to the other party. The failure to initiate arbitration within that period constitutes an absolute bar to the institution of any proceedings."

(4) No Punitive Damages: "The arbitrator shall have no authority . . . to award punitive damages."

(5) Prevailing Parties' Attorney's Fees: "The prevailing party, or substantially prevailing party's costs of arbitration are to be borne by the other party, including reasonable attorney's fees."

CP 18-25, 97-98.

In overruling MHNGS's Motion to Compel Arbitration, the Superior Court declined to apply the U.S. Supreme Court's recent landmark decision on arbitration agreement unconscionability—AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 179 L. Ed. 2d (2011). Instead it ruled that Concepcion applied only to arbitration agreements with class action waivers. RP 38. The Superior Court then held that the challenged provisions of the Arbitration Agreement were unconscionable,

refused to sever any of those provisions, and instead held that the entire Arbitration Agreement was unenforceable. RP 40-44.

IV. ARGUMENT

A. Standard of Review

The Court decides the question of arbitrability de novo. Adler v. Fred Lind Manor, 153 Wn.2d 331, 342, 103 P.3d 773, 780 (2004); see also Greenspan v. LADT, LLC, 185 Cal. App. 4th 1413, 1436-37, 111 Cal. Rptr. 3d 468, 486 (2010). Where, as here, there are no relevant disputed facts, contract interpretation is also reviewed de novo. Keystone Masonry, Inc. v. Garco Constr., Inc., 135 Wn. App. 927, 932, 147 P.3d 610, 613 (2006); see also Wolf v. Walt Disney Pictures & Television, 162 Cal. App. 4th 1107, 1134, 76 Cal. Rptr. 3d 585, 608-09 (2008).

Under California law, which applies to the PSTOA, Respondents have the burden to demonstrate that the Arbitration Agreement is unenforceable. Engalla v. Permanente Med. Grp., Inc., 15 Cal. 4th 951, 972, 64 Cal. Rptr. 2d 843, 938 P.2d 903 (1997) (observing that the party opposing arbitration has the burden to prove that an arbitration agreement is unenforceable); see also Adler, 153 Wn.2d at 342 (same).

B. The FAA Preempts State Laws Hostile to Arbitration.

The U.S. Supreme Court's recent decision in Concepcion took direct aim at what it views as a persistent problem of "judicial hostility

towards arbitration." 131 S. Ct. at 1747. The Court's message was unequivocal: state laws that interfere with the fundamental attributes of arbitration are preempted by the FAA. Id. at 1747-48.

The "principal purpose" of the FAA (9 U.S.C. § 1 *et seq.*) is to "ensur[e] that private arbitration agreements are enforced according to their terms." Concepcion, 131 S. Ct. at 1748 (alteration in original) (internal quotation marks omitted). The FAA allows parties to "forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." Id. at 1751 (internal quotation marks omitted). Because arbitration is a highly favored means of settling disputes, the U.S. Supreme Court has held that arbitration agreements "must be rigorously enforced." Perry v. Thomas, 482 U.S. 483, 490, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987) (arbitration agreement upheld and arbitration compelled for claim for unpaid wages under California Labor Code) (internal quotation marks omitted). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

In Concepcion, the U.S. Supreme Court has recently emphasized that the FAA embodies "'a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.'" 131 S. Ct. at 1749 (quoting Moses H. Cone, 460 U.S. at 24). The Court echoed this sentiment when it recently reversed the West Virginia Supreme Court in Marmet Health Care Center, Inc. v. Brown, Nos. 11-391, 11-394, 2012 U.S. LEXIS 1076, at *4 (Feb. 21, 2012) (per curiam) (FAA "reflects an emphatic federal policy in favor of arbitral dispute resolution" (internal quotation marks omitted)). The Court also has confirmed that the FAA trumps other federal laws, as well. See CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 667 (2012) (the FAA prevails over federal laws that are hostile to arbitration, unless the FAA's mandate has been "overridden by a contrary congressional command" (internal quotation marks omitted)); see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1773-74, 176 L. Ed. 605 (2010) ("Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties. In this endeavor, as with any other contract, the parties' intentions control." (internal quotation marks and citation omitted)).

The Court has so often returned to this issue (and, indeed, has done so twice since Concepcion in Marmet and CompuCredit Corp.) because this hostility "ha[s] manifested itself in a great variety of devices and formulas declaring arbitration against public policy." Concepcion, 131 S. Ct. at 1747 (internal quotation marks omitted); see also Marmet, 2012 U.S. LEXIS 1076, at *5 (citing Preston v. Ferrer, 552 U.S. 346, 356, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008)) (FAA preempts state law prohibiting waivers of right to administrative hearing in arbitration agreements); Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 55, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995) (FAA preempts state law requiring judicial resolution of claims involving punitive damages); Perry, 482 U.S. at 491 (FAA preempts state limitation on arbitrations of wage disputes); Southland Corp. v. Keating, 465 U.S. 1, 10, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984) (FAA preempts state statutory limitations on arbitration of financial investment claims); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006) (enforcing arbitration agreement within agreement that was challenged as illegal on state law grounds).

The resounding message from the U.S. Supreme Court is clear: when the FAA applies—as it does here—courts must look to enforce arbitration agreements.

C. Courts Cannot Rely on General Unconscionability Principles if They Interfere with the Fundamental Attributes of Arbitration.

Section 2 of the FAA states that arbitration agreements are "valid, irrevocable, and enforceable" as written, subject to a savings clause for "grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The U.S. Supreme Court has interpreted this savings clause to allow arbitration agreements to be invalidated by "generally applicable contract defenses" but not by "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." Concepcion, 131 S. Ct. at 1746 (internal quotation marks omitted). Respondents latched onto this principle in the proceedings below to argue that the generally applicable defense of unconscionability may be asserted to void the Arbitration Agreement. CP 27-32. Yet this approach reflects a profound misunderstanding of Concepcion and related U.S. Supreme Court precedent.

In Concepcion, respondents had relied on unconscionability principles, and specifically California Supreme court authority, to argue that a class action waiver in an arbitration agreement was unenforceable. Concepcion, 131 S. Ct. at 1746-47. Previously, California courts had held that class action waivers were unconscionable in Discover Bank v. Superior Court, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100

(2005). The Discover Bank court justified this restriction by reasoning that it did not "take[] its meaning precisely from the fact that a contract to arbitrate is at issue." Id. at 164. Rather, the California Supreme Court purported to apply general unconscionability principles from contracts law. Id. at 165-66. On its face, according to the California Supreme Court, the Discover Bank rule "applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements." Id.

The U.S. Supreme Court rejected the Discover Bank rule, holding that the rule espoused by the California Supreme Court "[stood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Concepcion, 131 S. Ct. at 1753 (internal quotation marks omitted). As the U.S. Supreme Court pointed out, the FAA was enacted "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings." Id. at 1748. To that end, the Court recognized the long-standing principle that arbitration agreements can legally limit protections otherwise available in litigation to further the goal of efficiency, noting "that the FAA's preemptive effect might extend even to grounds traditionally thought to exist 'at law or in equity for the revocation of any contract.'" Id. at 1747 (quoting Perry, 482 U.S. at 492 n.9).

Concepcion ultimately clarified that there are three types of defenses that cannot be raised against arbitration agreements: those that (1) apply only to arbitration; (2) derive their meaning from the fact that an agreement to arbitrate is at issue; or (3) are generally applicable but "interfere[] with [the] fundamental attributes of arbitration," such as its informality and speed. 131 S. Ct. at 1746, 1748-49.

The Court also made clear that its holding applied not only to class action waivers and the Discover Bank rule, but to all attempts to use unconscionability as a defense in a manner that disproportionately impacts arbitration agreements. The Court illustrated this with a variety of examples. For instance, under general unconscionability principles, a court could find that a provision in an arbitration agreement that fails to provide for judicially monitored discovery is unenforceable. Concepcion, 131 S. Ct. at 1747. A court could say that this is unconscionable in any type of contract because "no consumer would knowingly waive his right to full discovery" in arbitration or litigation. Id. However, the Court concluded that because rules such as these would have a disproportionate impact on arbitration agreements, Courts should not apply them as a bar to their enforceability. Id.

The Court went on to note that "[o]ther examples are easy to imagine," and made specific reference to evidence of abuse of the

unconscionability defense in California. See id. at 1747 ("California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts.") (citing Stephen A. Broome, An Unconscionable Applicable of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act, 3 Hastings Bus. L. J. 39, 54, 66 (2006); Susan Randall, Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability, 52 Buff. L. Rev. 185, 186-87 (2004)). At a minimum, Concepcion calls into doubt the continued precedential value of any pre-Concepcion California decision (or similar authority from any other jurisdiction) that refuses to enforce an arbitration agreement on the basis that the agreement was unconscionable.

Determining what is "unconscionable" requires a return to the basics of the black letter law. Historically, "unconscionable" provisions have been those "that were so unfair as to shock the conscience of the court." E. Allen Farnsworth, Contracts § 4.27 (4th ed. 2004) (internal quotation marks omitted). They were "bargains of such an unconscionable nature, and of such gross inequality, as naturally lead to the presumption of fraud, imposition, or undue influence . . . as no man in his senses and not under delusion would make." Joseph Story, Commentaries on Equity Jurisprudence §§ 244, 246 (1835). So for example, adhesion contracts are not per se unconscionable. Concepcion,

131 S. Ct. at 1750. Similarly, modifying the procedures that are otherwise available in litigation in order to obtain the benefits gained through arbitration—"lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes," id. at 1751—do not "shock the conscience."

D. The Superior Court Misread Concepcion.

The Superior Court's opinion is premised on a fundamental misunderstanding of Concepcion. The court explained, "I think that case dealt specifically with . . . class arbitration and I don't see it as broad as saying that states can't apply any laws or rules that would do anything to impact the arbitrability or arbitration process." RP 38. The Superior Court read Concepcion too narrowly.

The Superior Court further erred by embracing the false dichotomy presented by Respondents: that either Concepcion is a narrow ruling with no applicability outside of class action waivers in arbitration agreements, or that it bars courts from ever holding any arbitration agreement unconscionable for any reason.[2]

[2] Respondents presented an extreme example, arguing that a broader reading of Concepcion would mean that an employer could impose an arbitration agreement upon its employees under which: "(1) the aggrieved party would be permitted one minute to state its grievance; (2) to the employer's on-staff arbitrator; (3) with damages limited to one dollar." CP 178. Such an extreme example would not survive, even under Concepcion, and has no application to this case. As explained above, the fundamental purpose of the FAA is to provide for an expedited and fair resolution of disputes. Respondents' example runs counter to that because it would virtually eliminate the possibility of a fair

In this case, when the Arbitration Agreement is viewed under general principles of unconscionability—as Concepcion mandates—it should be clear that the provisions about which Respondents complain do not "shock the conscience," and the Court should enforce the parties' agreement to arbitrate the disputes raised in this case.

E. The Challenged Provisions of the Agreement Are Enforceable.

Arbitration agreements are assumed to be enforceable absent proof to the contrary, and Respondents had the burden to prove unconscionability. Engalla, 15 Cal. App. 4th at 972. As mentioned above, any doubts about enforceability must be resolved in favor of arbitration. Moses H. Cone, 460 U.S. at 24-25. In addition, "[b]oth the procedural and substantive elements must be met before a contract or term will be deemed unconscionable." Monex Deposit Co. v. Gilliam, 671 F. Supp. 2d 1137, 1142 (C.D. Cal. 2009) (internal quotation marks omitted). Under the traditional sliding scale unconscionability analysis, where there is a weaker showing of procedural unconscionability, there must be a stronger showing of substantive unconscionability. Gatton v. T-Mobile USA, Inc., 152 Cal. App. 4th 571, 586, 61 Cal. Rptr. 3d 344, 356 (2007)

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resolution. Concepcion does not lead to the absurd result that Respondents suggest. And, in accepting Respondents' arguments, the Superior Court missed Concepcion's true import.

1. Procedural Unconscionability Is Absent.

The Superior Court erred in finding the Arbitration Agreement procedurally unconscionable. Procedural unconscionability pertains to the making of the agreement; it focuses on the oppression that arises from unequal bargaining power and the surprise to the weaker party that results from hidden terms or the lack of informed choice. Dotson v. Amgen, Inc., 181 Cal. App. 4th 975, 980, 104 Cal. Rptr. 3d 341 (2010); see also Higgins v. Superior Court, 140 Cal. App. 4th 1238, 1252, 45 Cal. Rptr. 3d 293 (2006) (referring to oppression and surprise, which is a function of the disappointed reasonable expectations of the weaker party); 24 Hour Fitness, Inc. v. Superior Court, 66 Cal. App. 4th 1199, 1213, 78 Cal. Rptr. 2d 533 (1998) (referring to unequal bargaining positions and hidden terms). The "surprise" element concerns whether "the challenged term is hidden in a prolix printed form or is otherwise beyond the reasonable expectation of the weaker party." Monex, 671 F. Supp. 2d at 1143 (internal quotation marks omitted). The "[o]pression" element refers "not only to an absence of power to negotiate the terms of the contract, but also to the absence of reasonable market alternatives." Id. at 1144 (internal quotation marks omitted).

The Superior Court acknowledged that the Arbitration Agreement had features that tended against procedural unconscionability, including

that MHNGS solicited Respondents to contract with MHNGS and that the Arbitration Agreement was highlighted and easy to read. RP 40. Nevertheless, the court held the Arbitration Agreement procedurally unconscionable for two reasons. First, the court speculated that "the [Respondents], if they wanted to work for the defendant, had to accept the contract. There's no indication or evidence of any negotiation that was set forth" in accepting the Agreement. Id. Second, the Superior Court determined that there was "language in [the Arbitration Agreement] that was less than clear," making it "oppressive." Id. As discussed below, both grounds are insufficient to support a finding of procedural unconscionability.

a. There Is No Evidence That Respondents Had to Accept the Contract or Could Not Negotiate.

The Superior Court erred in finding that Respondents had to accept the Agreement and could not negotiate its terms because Respondents presented no evidence to that effect. To the contrary, the evidence shows that they were on equal footing with MHNGS.

Respondents did not dispute that they had time to read and consider the terms of the Agreement. CP 33-34, 53-54. And there was no evidence that Respondents tried to change the Arbitration Agreement. CP 33-34, 53-54. Moreover, Respondents are sophisticated bargaining

parties. Respondent Brown is a Licensed Independent Clinical Social Worker and sole proprietor of a business, and Respondent Cindy Hiett said that she was a Marriage Family Therapist. CP 99, 109. Respondents' high level of education and business expertise—and the fact that MHNGS was recruiting them—suggest that they were on level footing with MHNGS.

Furthermore, Respondents did not show that they lacked other "reasonable market alternatives," a glaring omission given that Respondent Brown represented herself as a "sole proprietor" and Respondent Hiett was already providing her services as an MHN provider. CP 53, 99. MHNGS recruited Respondents, and there is no evidence that either Respondent was looking for a Consultant position at the time MHNGS contacted them. CP 33, 53. This evidence suggests that Respondents could have simply chosen to reject MHNGS's solicitation altogether. This is a far cry from a "take-it-or-leave-it" proposition. CP 37, 54.

And even if Respondents had shown that they had to accept the PSTOA as-is to perform services for MHNGS, that fact alone would not suffice to make the Agreement unconscionable. Monex, 671 F. Supp. 2d at 1143 (applying California law to hold "a contract of adhesion is not necessarily unconscionable").

b. The Language in the Agreement Is Clear and Not Oppressive.

The Superior Court erred in concluding that there was "language in [the Arbitration Agreement] that [wa]s less than clear," and therefore the Arbitration Agreement was "oppressive." RP 40. First, contractual ambiguity is not oppression. Rather, oppression arises from unequal bargaining power and hidden terms or the lack of informed choice. Dotson, 181 Cal. App. 4th at 980. Respondents produced no evidence that any kind of ambiguity in the contract diminished their bargaining power or led to uninformed choices.

Similarly, the lower court's concern that the Agreement was unclear is difficult to square with the plain language of the Agreement and the court's other findings. The Superior Court itself acknowledged that the Agreement was highlighted and easy to read. RP 40. See Monex, 671 F. Supp. 2d at 1143-44 (finding no procedural unconscionability where arbitration provisions were in the same typeface and font as rest of agreement with accurate headings); compare Higgins, 140 Cal. App. 4th at 1252-53 (finding procedural unconscionability where arbitration agreement was included in paragraph labeled "miscellaneous" and did not include highlighting and bold print that was featured in other paragraphs of the agreement).

Respondents suggested below that the incorporation of the AAA rules into the Arbitration Agreement was oppressive, but this, too, is untenable because the AAA Rules were readily available on the Internet (www.adr.org) and Respondents have never alleged that they could not access them or otherwise inquire about them. CP 33-34, 53-54. Nor have Respondents ever claimed that the AAA rules themselves are oppressive or limit their ability to obtain remedies, and the law on this point is to the contrary. See, e.g., Sullivan v. Lumber Liquidators, Inc., No. C-10-1447, 2010 WL 2231781, at *5-6 (N.D. Cal. Jun. 2, 2010) (unpublished) (rejecting claim that incorporation of AAA rules in arbitration agreement without inclusion of a copy of the AAA rules created "surprise" where the AAA rules did not limit respondent's substantive remedies). For the same reason, that the Arbitration Agreement did not specify which set of AAA rules applied—commercial, employment, or otherwise—is of no consequence. The differences between the sets of rules are negligible, and Respondents have not asserted that any of them are unfair. See Perez v. Maid Brigade, Inc., No. C 07-3473, 2007 WL 2990368, at *6 n.6 (N.D. Cal. Oct. 11, 2007) (unpublished) (rejecting claim that arbitration agreement's incorporation of the AAA rules without specifying which set of rules apply was unconscionable, as "the [AAA] rules themselves" provide the means to determine which rules apply to the dispute).

Under the principles espoused in Concepcion, the reasons cited by the Superior Court to find procedural unconscionability are simply off the mark. If anything, the AAA rules add a further buffer of fairness and neutrality and would improve the likelihood of a speedy and efficient resolution of this dispute, which is consistent with the purposes of the FAA. See Engalla, 15 Cal. 4th at 975-76 (referring to AAA as a "neutral third party organization[]"); AAA, http://www.adr.org (last visited Mar. 9, 2012) (listing its multiple resources, including its panel of neutral arbitrators and case administration services). With such little evidence of procedural unconscionability, Respondents have a particularly high burden to show that the Arbitration Agreement is substantively oppressive, which they have not met. Gatton, 152 Cal. App. 4th at 586.

2. Substantive Unconscionability Is Absent.

"'Substantive unconscionability relates to the effect of the contract or provision.'" Soltani v. W. & S. Life Ins. Co., 258 F.3d 1038, 1043 (9th Cir. 2001) (quoting West v. Henderson, 227 Cal. App. 3d 1578, 278 Cal. Rptr. 570, 575 (1991)). As explained previously, the term focuses on whether the terms of the agreement "are so one-sided as to *shock the conscience*." Soltani, 258 F.3d at 1043 (citing Kinney v. United Healthcare Servs., Inc., 70 Cal. App. 4th 1322, 83 Cal. Rptr. 2d 348, 353 (1999) (citations and internal quotation marks omitted).

a. Respondents Have Not Met Their Burden to Present Specific Facts Showing That the Forum Selection Provision Is Unduly Burdensome.

Under California law, contractual forum selection clauses are enforced unless one proves they are unreasonable under the circumstances of the case. Intershop Commc'ns AG v. Superior Court, 104 Cal. App. 4th 191, 198, 127 Cal. Rptr. 2d 847 (2002); Smith, Valentino & Smith, Inc. v. Superior Court, 17 Cal. 3d 491, 495-96, 131 Cal. Rptr. 374, 551 P.2d 1206 (1976). It is not enough to allege that the forum is inconvenient or expensive. Rather, the party must "demonstrate that the contractually selected forum would be unavailable or unable to accomplish substantial justice or that no rational basis exists for the choice of forum. Intershop Commc'ns, 104 Cal. App. 4th at 199.

Thus, in Intershop, the court enforced a forum selection clause in an adhesion agreement that mandated Hamburg, Germany as the litigation forum where the California respondent failed to present specific facts showing that Germany was an unreasonable forum. Id. at 199-200, 202. A German forum "ma[de] sense under the circumstances" when, among other things, the parties had "agreed that German law would apply." Id. at 200. Similarly, California law applies to the PSTOA and therefore a California forum is appropriate.

The U.S. Supreme Court has similarly held that forum-selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972). The Court further explained that the party opposing enforcement "bear[s] a heavy burden," and that it would be "incumbent on th[at] party . . . to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." Id. at 17, 18. "Absent that," the Court held, "there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain." Id. at 18. In a subsequent decision, the Court affirmed that the same rule applies to forum-selection agreements in "form contract[s] the terms of which are not subject to negotiation," and where the parties lack "bargaining parity." Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991); accord Dix v. ICT Group, Inc., 160 Wn.2d 826, 834, 161 P.3d 1016 (2007) (en banc).

Here, Respondents have set forth no facts demonstrating how a San Francisco venue is so oppressive that it would deprive them of their day in court. Perhaps that is because Respondent Brown apparently resides in northern California. CP 54, 71. Respondents' generalized

complaints that arbitration in San Francisco would require travel and new counsel is also puzzling. CP 23. Nothing prevents Respondents' current counsel from representing them in an arbitration held in San Francisco, as arbitrations do not require that attorneys be licensed in the forum state. See AAA Commercial Arbitration Rules, http://www.adr.org/sp.asp?id=22440#24, R-24 (last visited Mar. 9, 2012) (containing no requirement that counsel be licensed in forum state). And the cost of out-of-state travel has not prevented Respondent Brown from filing suit in Washington.

The authority cited by Respondents below—Bolter v. Superior Court, 87 Cal. App. 4th 900, 104 Cal. Rptr. 2d 888 (2001)—is also distinguishable. In Bolter, the respondents submitted detailed affidavits describing how the forum selection clause mandating arbitration in Salt Lake City, Utah was unduly oppressive in their circumstances. Id. at 910 (quoting respondent declarations describing specific aspects of franchise business, family circumstances, and personal finances that made out-of-state travel burdensome). As the case law teaches, analysis of a forum selection clause must be highly individualized and based on the circumstances of the case before the court. The Superior Court apparently ignored the specifics of this case.

The Superior Court also mysteriously invoked Concepcion, apparently believing that the holding in that case hinged on the fact that the arbitration agreement in that case allowed claimants to "bring the arbitration where they live." RP 42. But the Concepcion Court mentioned the forum clause only in passing and certainly did not rely on it for its holding. Concepcion, 131 S. Ct. at 1744. If another court in another case found that a forum selection clause was unconscionable in that case, that finding has no bearing on the individual circumstances before this Court.

b. The Arbitrator Selection Provision Allows for a Neutral Arbitrator.

The Arbitration Agreement provides for fair and neutral arbitrator selection procedures that are in accordance with the rules of the AAA. As such, it has more than the "minimum levels of integrity" that courts look for when evaluating arbitrator selection arrangements. See, e.g., Graham v. Scissor-Tail, Inc., 28 Cal. 3d 807, 825, 171 Cal. Rptr. 604, 623 P.2d 165 (1981).

First, the Arbitration Agreement provides for a "neutral arbitrator who is licensed to practice law." CP 97 (emphasis added). Second, the Arbitration Agreement provides that the arbitration would be conducted "in accordance with the provisions of the American Arbitration Association." Id. Under the AAA Rules, if the parties' agreement

specifies an arbitrator selection method, the AAA Rules explain that "[u]pon the request of any appointing party, the AAA shall submit a list of members of the National Roster." AAA, Commercial Arbitration Rules, http://www.adr.org/sp.asp?id=22440#12, R-12. The AAA Rules ensure the neutrality of the selection and provide that, "[a]ny arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith." Id., R-17.

The Arbitration Agreement provides detail regarding the specific number of potential arbitrators to be selected from the AAA's roster, indicating that "MHN shall provide [the Consultant] with a list of three neutral arbitrators from which [the Consultant] shall select its choice of arbitrator for the arbitration." CP 97 (emphasis added). Thus, the Consultant, not MHNGS, has control over the final selection of a neutral arbitrator.

Respondents, ignoring the requirement that the arbitrator be neutral, argued that the provisions allow MHNGS to unilaterally select a pool of potential arbitrators from which Respondents could choose. CP 22. But this argument ignores that the Agreement specifically incorporates the AAA Rules for selecting an arbitrator, which are widely recognized as effective in securing a neutral decision-maker. See, e.g., Engalla, 15 Cal. App. 4th at 975-76 (noting with favor "neutral third party

organizations, such as the [AAA]"); Proctor v. Andrews, 972 S.W.2d 729, 736 (Tex. 1998) (noting that "the AAA . . . [is a] highly respected entit[y] with expertise in the area of arbitration"). There should be no doubt that affording Respondents the final say in choosing who would decide this matter from a panel of three neutral arbitrators does not "shock the conscience." The AAA Rules themselves provide significant safeguards to ensure that the selected arbitrator is fair.

c. The Punitive Damages Limitation Should Be Interpreted to Allow for Statutory Penalties.

The Agreement lawfully precludes the arbitrator from awarding "punitive damages" to either party. Generally, a limitation on common law punitive damages is not unconscionable. See Monex, 671 F. Supp. 2d at 1147 ("[T]he Court does not believe that a limitation on damages to actual contract and tort damages . . . shocks the conscience or is unfairly one-sided."). This is particularly true where, as here, the provision is bilateral and benefits Respondents as well. In the example provided earlier, if MHNGS had a fraud claim against one of the Respondents, MHNGS would be precluded from seeking punitive damages.[3]

Nevertheless, the Superior Court found the provision unconscionable, because it interpreted the express limitation on "punitive

[3] Under California law, which applies to the PSTOA, punitive damages may be awarded for an intentional misrepresentation. Cal. Civ. Code § 3294(a).

damages" to preclude Respondents from recovering statutory double damages authorized under RCW 49.52.070. RP 41. This was an unreasonable interpretation of the provision.

First, "punitive damages" are distinguishable from "statutory damages." In PacifiCare Health Systems, Inc. v. Book, 538 U.S. 401, 405-07, 123 S. Ct. 1531, 155 L. Ed. 2d 578 (2003), the U.S. Supreme Court considered the enforceability of certain arbitration agreements, two of which stated that "punitive damages shall not be awarded." Id. at 405 (internal quotation marks omitted). The plaintiffs argued that the agreements were unconscionable because they precluded a treble damages award under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), the statute governing the plaintiffs' claims. Id. But the U.S. Supreme Court noted that statutory treble-damages provisions fell within a "spectrum between purely compensatory and strictly punitive awards" and that in past cases it had characterized the RICO treble-damages award as remedial. Id. at 405-06. Based on the ambiguity concerning whether the statutory damages provision was, in fact, punitive and "uncertainty surrounding the parties' intent with respect to the contractual term 'punitive,'" the Court held that the question of whether the arbitration agreement prohibited RICO treble damages was "to say the least, in doubt." Id. at 406. Therefore, the Court compelled arbitration, reasoning

that it was premature to rule the "ambiguous" arbitration agreement unenforceable when it did not know whether or not the arbitrator would construe it to preclude statutory treble damages. Id.

Here, PacificCare compels enforcement of the Arbitration Agreement. Indeed, the prohibition against "punitive damages" in the Agreement is almost identical to the one that the U.S. Supreme Court held ambiguous in PacifiCare. Washington law prohibits punitive damages "unless expressly authorized by the legislature." Barr v. Interbay Citizens Bank of Tampa, Fla., 96 Wash. 2d 692, 697, 635 P.2d 441 (1981) amended by 96 Wash. 2d 692, 649 P.2d 827 (1982). The statutory double damages arguably at issue here are not "expressly" punitive. As in PacifiCare, courts have repeatedly emphasized that Washington's Minimum Wage Act ("MWA"), which contains the double damages provision, is remedial in nature. See, e.g., Anfinson v. FedEx Ground Package Sys., Inc., 159 Wn. App. 35, 52, 244 P.3d 32, 40 (2010) (noting that "the purpose of the MWA is to provide remedial protections to workers" and referring to it as "remedial legislation"), review granted, 172 Wn.2d 1001 (2011); Morrison v. Basin Asphalt, 131 Wn. App. 158, 163, 127 P.3d 1 (2005) ("The act is remedial and should be construed liberally to effectuate the purpose of the statute"). Insofar as there is any remaining ambiguity regarding whether the statutory double damages are "punitive"

versus "remedial," the Agreement should be enforced and the ambiguity should be resolved by the arbitrator. PacifiCare, 538 U.S. at 407.

Finally, the Court should reject Respondents' complaint about this provision altogether for another reason. MHNGS has consistently stated that this provision in the Arbitration Agreement would not prevent Respondents from recovering applicable statutory penalties. CP 143, 154. Thus, Respondents' argument is illusory. Therefore, there is not a strong basis for construing the Arbitration Clause to preclude statutory double damages, and the Court should follow the U.S. Supreme Court's lead and compel arbitration.

d. The Limitation on Delay in Bringing Claims Is Not Unconscionable.

The Arbitration Agreement requires that either party initiate their claim "within 6 months after the alleged controversy or claim occurred." CP 98. Such limitations are not *per se* unlawful, much less unconscionable: "California courts have afforded contracting parties considerable freedom to modify the length of a statute of limitations" if the contracted limitations period provides sufficient time to pursue a claim. Moreno v. Sanchez, 106 Cal. App. 4th 1415, 1430, 131 Cal. Rptr. 2d 684, 695 (2003); see also Soltani, 258 F.3d at 1043-44 ("[T]he weight

of California case law strongly indicates that the six-month limitation provision is not substantively unconscionable.").

Here, Respondents can hardly argue that requiring them to bring claims within six months was unreasonable or "shocks the conscience" because they already met this requirement. CP 1-10, 99, 109. First, they filed their initial complaint within six months of providing their services for MHNGS, thus making their claim timely. CP 1-10. Second, MHNGS has never disputed that they are entitled to pursue their claim and recover the full scope of monetary relief available, should they prevail. Finally, this provision is bilateral, benefiting Respondents as well as MHNGS. Not only does it preclude Respondents from delaying bringing claims, it also prevents MHNGS from waiting for long periods of time before bringing a claim against Respondents.

e. The Fee-Shifting Provision Is Not Unconscionable.

Respondents argue that the Arbitration Agreement's fee-shifting provision granting costs and fees to the prevailing party is unconscionable because Washington's wage hour statute grants costs and fees only to the prevailing Respondent. See, e.g., RCW 49.48.030. Respondents relied, however, on Washington (not California) law arising in the context of arbitrations. See Walters v. A.A.A. Waterproofing, Inc., 151 Wn. App.

316, 319, 330, 211 P.3d 454 (2009) (finding similar arbitration agreement unconscionable), review denied, 167 Wn.2d 1019 (2010). Restrictions such as this one that arise from case law specific to arbitrations and that are applied primarily to arbitration agreements interfere with the FAA's goal of promoting arbitration agreements and are invalid under Concepcion, 131 S. Ct. at 1748.

Indeed, a fee-shifting agreement can easily be deemed to be a provision that promotes the purpose of the FAA for streamlining the resolution of disputes. As a preliminary matter, it reduces the risk that either party will waste time bringing claims that have no merit. Furthermore, by eliminating uncertainty surrounding the allocation of the arbitrator's fees and other costs, it prevents contentious and time-consuming disputes from occurring after the arbitration has commenced.

While the state of Washington provides attorneys fees only to the prevailing Respondent, the parties can choose to bypass what the law ordinarily provides them for the sake of improving efficiency.

Moreover, Respondents' argument that, without the restriction on arbitration fee-shifting provisions, potential Respondents could be deterred from bringing claims has already been rejected by the U.S. Supreme Court. In Concepcion, the Court responded that "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for

unrelated reasons." Id. at 1753. Thus Concepcion teaches that rules specific to arbitration agreements that restrict fee-shifting agreements are inconsistent with the FAA, regardless of the reasons for adopting the restriction.

F. Assuming Any Provision Was Unconscionable, the Superior Court Should Have Severed and Enforced the Agreement.

The Superior Court's refusal to sever purportedly unconscionable provisions from the Arbitration Agreement was perhaps the most egregious misapplication of Concepcion and California law. The Superior Court ignored undisputed facts that had a direct bearing on its severability analysis. These errors caused the Superior Court to throw out the Arbitration Agreement, despite the Agreement's clear statement that "[i]n the event that any provision of this Agreement is rendered invalid or unenforceable by any valid law or regulation of the State of California or of the United States, or declared void by any tribunal of competent jurisdiction, the remaining provisions of this Agreement shall remain in full force and effect." CP 97.

California courts have followed a strong policy in favor of upholding contracts. See, e.g., Adair v. Stockton Unified Sch. Dist., 162 Cal. App. 4th 1436, 1450, 77 Cal. Rptr. 3d 62 (2008); see also Beynon v. Garden Grove Med. Grp., 100 Cal. App. 3d 698, 713, 161 Cal. Rptr. 146

(1980) (noting "loose view of severability" in California contract law) (quoting 1 Witkin, Summary of Cal. Law, Contract §343 (8th ed. 1973)). One justification that the courts have articulated for encouraging severability is to preserve the contractual relationship, so long as doing so does not "condon[e] an illegal scheme." MKB Mgmt., Inc. v. Melikian, 184 Cal. App. 4th 796, 804, 108 Cal. Rptr. 3d 899, 904 (2010) (internal quotation marks omitted). This policy is in line with the U.S. Supreme Court precedent. See, e.g., Concepcion, 131 S. Ct. at 1749 (noting that one goal of the FAA is "enforcement of privately made agreements"); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1774, 176 L. Ed. 2d 605 (2010) ("Arbitration is simply a matter of contract between the parties[.]") (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995)); Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2776, 177 L. Ed. 2d 403 (2010) ("[A]rbitration is a matter of contract.").

The Superior Court explained that to determine whether it could sever, it evaluated whether the Agreement was "permeated by . . . unconscionability." RP 43. According to the court, permeation is "indicated by the fact that there's no single provision that the Court can strike or restrict in order to remove the unconscionable taint from the agreement." Id. This view is generally inconsistent with California law.

Courts evaluate severability by looking to whether "the central purpose of the contract is tainted with illegality" or whether "the interests of justice would be furthered by severance." Shopoff & Cavallo LLP v. Hyon, 167 Cal. App. 4th 1489, 1523, 85 Cal. Rptr. 3d 268, 297 (2008) (internal quotation marks omitted). Thus, if the contract has only one purpose, and that sole purpose is illegal, then the court may not sever. MKB Mgmt, 184 Cal. App. 4th at 803 ("If . . . a contract has only a single object and that object is unlawful, in whole or in part, the entire contract is void."). Where there are various purposes, however, the court considers whether "the central purpose of the contract is tainted with illegality," or whether the illegality is merely "collateral to the main purpose." Id. (internal quotation marks omitted).

The Superior Court went awry when it concluded that, if it were to sever the challenged provisions, it would have to rewrite the Agreement; there would be no remaining "guidelines as to where or with whom" to arbitrate. RP 43-44. This is not so. The Agreement incorporated the AAA Rules, which were more than sufficient to determine where and with whom to arbitrate, as well as all other necessary procedural details.

As to the "where," the court could have severed the San Francisco venue provision, and the AAA Rules would have filled in the blanks. The AAA Rules provide that the parties can "mutually agree on the locale,"

and if one party objects, the AAA will determine the locale. AAA, http://www.adr.org/sp.asp?id=22440 #R10, R-10 (last visited Mar. 9, 2012).

As to the "whom," the AAA rules would again fill in the blanks. The AAA would send a list of neutrals from its National Roster to the parties from which they can choose an arbitrator. If the parties disagree on whom to select, the AAA resolves the dispute. Id. at R-11.

The trial court mentioned no concerns regarding the remaining provisions related to fee-shifting, punitive damages, and the six-month limitations period. But they, too, can easily be severed without impacting the overall force of the Agreement. As to fees, damages, and the amount and scope of other recovery amounts, the AAA Rules allow the arbitrator to "grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties." AAA, http://www.adr.org/sp.asp?id=22440#R43, R-43 (last visited Mar. 9, 2012). This includes an apportionment in the final award of "fees, expenses, and compensation . . . in such amounts as the arbitrator determines is appropriate," including interest and "an award of attorneys' fees if . . . it is authorized by law." Id.

As reflected below, even if every single one of the challenged provisions were severed from the Agreement, the provisions are not so

central to the Agreement that the Agreement cannot exist without them. Stated differently, the parties would still be able to arbitrate their dispute and the arbitrator could grant the relief Respondents seek without the complained-about provisions. The Arbitration Agreement, striking the allegedly unconscionable provisions, would remain largely intact and would read as follows:

Mandatory Arbitration. The parties agree to meet and confer in good faith to resolve any problems or disputes that may arise under this Agreement. Such negotiation shall be a condition precedent to the filing of any arbitration demand by either party. The parties agree that any controversy or claim arising out of or relating to this Agreement (and any previous agreement between the parties if this Agreement supersedes such prior agreement) or the breach thereof, whether involving a claim in tort, contract or otherwise, shall be settled by final and binding arbitration in accordance with the provisions of the American Arbitration Association. The parties waive their right to a jury or court trial. ~~**The arbitration shall be conducted in San Francisco, California.**~~ A single, neutral arbitrator who is licensed to practice law shall conduct the arbitration. The complaining party serving a written demand for arbitration upon the other party initiates these arbitration proceedings. The written demand shall contain a detailed statement of the matter and facts supporting the demand

and include copies of all related documents. ~~**MHN shall provide Provider with a list of three neutral arbitrators from which Provider shall select its choice of arbitrator for the arbitration**~~. Each party shall have the right to take the deposition of one individual and any expert witness designated by another party. At least thirty (30) days before the arbitration, the parties must exchange lists of witnesses, including any experts (one of each for MHN and Provider), and copies of all exhibits to be used at the arbitration. ~~**Arbitration must be initiated within 6 months after the alleged controversy or claim occurred by submitting a written demand to the other party. The failure to initiate arbitration within that period constitutes an absolute bar to the institution of any proceedings.**~~ Judgment upon the award rendered by the arbitrator may be entered in any court having competent jurisdiction. The decision of the arbitrator shall be final and binding. The arbitrator shall have no authority to make material errors of law ~~**or to award punitive damages**~~ or to add to, modify or refuse to enforce any agreements between the parties. The arbitrator shall make findings of fact and conclusions of law and shall have no authority to make any award that could not have been made by a court of law. ~~**The prevailing party, or substantially prevailing party's costs of arbitration, are to be borne by the other party, including reasonable attorney's fees.**~~

The Arbitration Agreement without the severed provisions sufficiently sets forth the information needed to proceed with arbitration. No reformation by the court was or is needed to enforce the Arbitration Agreement, even after severability. And given the strong and overriding federal policy in favor of promoting arbitration agreements, the Superior Court should have enforced arbitration and not overlooked the comprehensive and fair procedures incorporated into the Arbitration Agreement.

V. CONCLUSION

For the reasons stated, MHNGS respectfully requests the Court to reverse the decision of the Superior Court denying its Motion to Compel Arbitration and granting Respondents' Motion to Quash Arbitration.

DATED this 12th day of March 2012.

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: _____
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Attorneys for Respondents

EXHIBIT A

C

Only the Westlaw citation is currently available.

United States District Court,
N.D. California.
Virginia PEREZ, individually and on behalf of all other similarly situated, Plaintiffs,
v.
MAID BRIGADE, INC., a Delaware Corporation, and BMJ LLC, a California Limited Liability Company, Defendants.

No. C 07-3473 SI.
Oct. 11, 2007.

Alan Dale Harris, David S. Harris, David Sohn Zelenski, Harris & Ruble, Los Angeles, CA, for Plaintiff.

Daniel M. Shea, Michelle W. Johnson, Paul R. Beshears, Nelson Mullins Riley & Scarborough, LLP, Atlanta, GA, James A. Bowles, Hill, Farrer & Burrill, LLP, Los Angeles, CA, Patrick M. Macias, Ragghianti Freitas LLP, San Rafael, CA, for Defendants.

ORDER DENYING DEFENDANT BMJ'S MOTION TO COMPEL ARBITRATION AND STAY LITIGATION PENDING ARBITRATION

SUSAN ILLSTON, United States District Judge.

***1** Before the Court is BMJ LLC's motion to compel arbitration and stay litigation pending arbitration. Pursuant to Civil Local Rule 7-1(b), the Court determines that the matter is appropriate for resolution without oral argument, and VACATES the October 12, 2007 hearing. Having considered the papers submitted, and for the reasons set forth below, the Court DENIES the motion.

BACKGROUND

1. Plaintiff's employment and class action allegations

Plaintiff Virginia Perez worked as a maid and as an office assistant for defendant BMJ LLC from in or about 2003 until June 1, 2007.[FN1] BMJ does business in California as Maid Brigade of Marin County, and is a franchisee of defendant Maid Brigade, Inc, a Delaware corporation. Complaint ¶ 2; BMJ's Answer at 4. Plaintiff alleges she was an employee of both BMJ and Maid Brigade. Complaint ¶ 4. Both defendants admit plaintiff was an employee of BMJ, but both deny she was an employee of Maid Brigade. BMJ's Answer at 4; Maid Brigade's Answer at 4. Plaintiff alleges that during employment, she sometimes worked in excess of eight hours per day and forty hours per week, often without rest periods or meal breaks. Complaint ¶ 5. She alleges she did not receive the minimum wage or overtime compensation during these periods. *Id.* ¶ 7. She also alleges that, although her employment ended on June 1, 2007, she did not receive her final check until June 8, 2007. *Id.* ¶¶ 8, 11. Furthermore, plaintiff alleges BMJ failed to provide pay stubs displaying certain information required by state law. *Id.* ¶ 22. Based on these allegations, she filed a class action against both defendants claiming various violations of state and federal labor laws, including the Federal Labor Standards Act.

FN1. Plaintiff's precise date of hire is unclear: BMJ states that plaintiff was "hired" in or around 2002, while the complaint alleges she "worked" in or around 2003 through June 1, 2007. Motion to Compel Arbitration ("Motion") at 3; Complaint ¶ 4; However, plaintiff's declaration states that she "began working for Maid Brigade in or about June 2002." Perez Decl. ¶ 3.

2. The arbitration agreement

BMJ moves the Court to stay litigation pending arbitration on the basis of an arbitration agreement allegedly signed by plaintiff as part of her employment agreement. BMJ contends plaintiff was hired in or around 2002, and that she executed an arbitration agreement in connection with her employment agreement. BMJ submitted to the Court a Spanish

version of the agreement, which it claims bears plaintiff's signature. Abbott Decl. Ex. A. BMJ also presented an English translation of the agreement. *Id.* The English version reads, in relevant part:

H. Alternative Dispute Resolution Agreement

I. In the event I believe that Maid Brigade has violated any of my legal rights arising out of or relating to my employment, or termination thereof, I agree to submit any and all such disputes to binding arbitration and not to file a lawsuit alleging a violation of my legal rights. Arbitration will be handled in accordance with the rules and procedures provided in this Agreement and the rules of the American Arbitration Association, where not in conflict with this Agreement.

II. Categories of disputes covered by this policy include, but are not [FN2] limited to:

> FN2. The Court has examined the Spanish language version allegedly executed by plaintiff. While the parties have not disputed the accuracy of the translation, and while the translation appears to be accurate in all aspects relevant here, the Court notes that the word "not" is absent from the first sentence of paragraph II of the Spanish version.

***2** A. Claims of employment discrimination ...;

B. Common law claims, including contract and tort claims; and

C. Worker's compensation claims.

...

IV. This policy includes the exclusive forum for dispute resolution and is intended to be final and binding on all parties.

Id. The Spanish version is hand dated "12/20/02" and is signed in block letters: "VIRGINIA PEREZ." *Id.* The Spanish version of the arbitration agreement is marked page "60" in the lower right corner of page, and the English version is marked page "53." *Id.*

BMJ submitted other portions of a packet of employment forms purportedly bearing plaintiff's signature, including an English language "non-competition agreement." *Id.* Although there are blanks on that agreement for the employer to fill in its own name and address, those blanks are not filled in. The document also contains a notation at the top that reads, "Because this form must be customized for every state, it was not translated into Spanish." Below that, the header of the form reads, "A. Non-Compete Agreement (must be customized for your State)."

In addition to the non-compete agreement and the arbitration agreement, BMJ's exhibit includes forms relating to a uniform policy, a job description, pay rates, and an employment manual acknowledgment form. *Id.* These forms refer throughout to "Maid Brigade" as the employer. The Court found no reference to "BMJ," "BMJ, Inc.," or "Maid Brigade of Marin."

LEGAL STANDARD

Section 4 of the Federal Arbitration Act permits "a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States District Court ... for an order directing that ... arbitration proceed in the manner provided for in [the arbitration] agreement." 9 U.S.C. § 4. Upon a showing that a party has failed to comply with a valid arbitration agreement, the district court must issue an order compelling arbitration. *See Cohen v. Wedbush, Noble Cooke, Inc.*, 841 F.2d 282, 285 (9th Cir.1988).

The FAA espouses a general policy favoring arbitration agreements. *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Federal courts are required to rigorously enforce an agreement to arbitrate. *See id.* In determining whether to issue an order compelling arbitration,

the Court may not review the merits of the dispute, but must limit its inquiry to (1) whether the arbitration agreement is governed by Chapter One of the Federal Arbitration Act (rather than Chapter Two or Chapter Three); (2) whether the contract containing the arbitration agreement evidences a transaction involving interstate commerce, (3) whether there exists a valid agreement to arbitrate, and (4) whether the dispute falls within the scope of the agreement to arbitrate. 9 U.S .C. §§ 2, 202, and 302; *see Nicaragua v. Standard Fruit Co.,* 937 F.2d 469, 477-78 (9th Cir.1991), *cert denied,* 503 U.S. 919, 112 S.Ct. 1294, 117 L.Ed.2d 516 (1992) (citing *Prima Paint's* clear directive that courts disregard surrounding contract language and "consider only issues relating to the making and performance of the agreement to arbitrate, *Prima Paint v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 404, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)); *Ecuador v. ChevronTexaco Corp.,* 376 F.Supp.2d 334, 347 (S.D.N.Y.2005) (noting the jurisdictional distinctions between Chapters One, Two and Three of the FAA). If the answer to each of these queries is affirmative, then the Court must order the parties to arbitrate in accordance with the terms of their agreement. 9 U.S.C. § 4.

***3** The FAA provides that arbitration agreements generally "shall be valid, irrevocable, and enforceable," but courts may decline to enforce them when grounds "exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening" federal law. *Doctor's Assocs., Inc. v. Casarotto.* 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996). In interpreting the validity and scope of an arbitration agreement, the courts apply state law principles of contract formation and interpretation. *See Wolsey, Ltd. v. Foodmaker, Inc.,* 144 F.3d 1205, 1210 (9th Cir.1998). Accordingly, the Court reviews the arbitration agreement here in light of the "liberal federal policy favoring arbitration agreements," *Moses H. Cone,* 460 U.S. at 24, and considers its enforceability according to California's laws of contract formation, *see First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995); *Ingle v. Circuit City Stores,* 328 F.3d 1165, 1170 (9th Cir.2003).

DISCUSSION

Plaintiff opposes arbitration primarily on two grounds: (1) plaintiff did not sign the arbitration agreement; and (2) the arbitration agreement is unconscionable and therefore unenforceable.[FN3] Defendant Maid Brigade does not oppose arbitration between BMJ and plaintiff, but does oppose arbitration between itself and plaintiff on the ground that it is not a party to the arbitration agreement.

FN3. Plaintiff also argues that the Federal Arbitration Act does not govern the arbitration agreement because BMJ has not proved it is involved in interstate commerce, thus failing to establish the jurisdictional requirement of 9 U.S.C. § 2. Plaintiff makes this argument despite the fact that her complaint alleges that BMJ is an "enterprise" subject to federal jurisdiction under the FLSA, 29 U.S.C. § 203 (implying BMJ is involved in interstate commerce for the purpose of the FLSA's jurisdictional requirements); and that BMJ receives training, "nationwide advertising," software, and access to Ford Focus vehicles from Maid Brigade. Complaint ¶ 2. BMJ contends it does engage in interstate commerce. Reply at 3.

Section 2 of the FAA makes enforceable a written arbitration provision in "a contract *evidencing* a transaction *involving* commerce." 9 U.S.C. § 2 (emphasis added); *see also Allied-Bruce Terminix Cos., Inc. v. Dobson,* 513 U.S. 265, 268, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995). In *Allied-Bruce,* an arbitration agreement contained in a contract for a termite inspection in Alabama was found to be

> governed by the FAA because the Alabama Terminix franchisee had a multi-state relationship with its franchisor, and because the materials used by the franchisee came from outside Alabama. 513 U.S. at 282. The situation here is similar to that in *Allied-Bruce.* Accordingly, the Court finds that the arbitration agreement is governed by the FAA.

I. Execution of the arbitration agreement

Section 4 of the Federal Arbitration Act provides for a summary process in resolving disputes over the existence of an arbitration agreement. *See* 9 U.S.C. § 4.[FN4] Where the disputed arbitration agreement was allegedly executed in California, or where the parties have otherwise agreed, the Court applies California's substantive law in determining its validity. *See Circuit City Stores, Inc. v. Mantor,* 335 F.3d 1101, 1105 (9th Cir.2003). Under California law, the petitioner bears the burden of proving the existence of an arbitration agreement by the preponderance of the evidence. *See Rosenthal v. Great W. Fin. Sec. Corp.,* 14 Cal.4th 394, 413, 58 Cal.Rptr.2d 875, 926 P.2d 1061 (1996). If the party opposing arbitration raises a defense to enforcement such as fraud in the execution of the agreement "that party bears the burden of producing evidence, and proving by a preponderance of the evidence, any fact necessary to the defense." *Id.*

> FN4. Courts employ "a summary judgment approach for such hearings, ruling as a matter of law when there is no genuine issue of material fact." *Geoffroy v. Wash. Mut. Bank,* 484 F.Supp.2d 1115, 1119 (S.D.Cal.2007); *see also Ferguson v. Countrywide Credit Indus.,* 2001 WL 867103 (C.D.Cal.2001), *aff'd,* 298 F.3d 778, 782 (9th Cir.2002); *Doctor's Assocs., Inc. v. Distajo,* 107 F.3d 126, 129-30 (2d Cir.1997) (under section 4 of the FAA, a party resisting arbitration and requesting a trial must submit evidence demonstrating a genuine issue of fact, as when opposing a motion for summary judgment).

Plaintiff does not challenge the existence of the arbitration agreement, but asserts in her opposition that she did not sign the arbitration agreement. However, plaintiff's sworn statements in her accompanying declaration are not so categorical. Plaintiff states, in reference to the arbitration agreement, "I did [sic.] not recall signing these documents. I do not recall being presented with any thick package of documents such as Exhibits 1 and 2. When I began working for Maid Brigade in or about June of 2002, I signed some documents, but they differed from those that are attached as Exhibits 1 and 2." Perez Decl. ¶¶ 2-3. Plaintiff also notes that the arbitration agreement is dated December 20, 2002, approximately six months after she began working for Maid Brigade (according to her declaration).

***4** The Court finds that plaintiff has not met her burden to prove that she did not sign the agreement. Plaintiff does not unequivocally deny signing the document. The Court also notes that the signature on plaintiff's sworn declaration appears similar, if not identical, to the signature on the arbitration agreement. *Compare* Abbott Decl. Ex. A *with* Perez Decl. at 1.

Ferguson v. Countrywide Credit Indus., 2001 WL 867103 (C.D.Cal.2001), *aff'd,* 298 F.3d 778, 782 (9th Cir.2002), is both instructive and distinguishable. In *Ferguson,* the court found that the plaintiff in that case had "raised a genuine dispute regarding whether an arbitration agreement govern[ed] her claims ...." *Id.* at *1. There, the plaintiff not only asserted that she had never seen the purported agreement prior to litigation, she pointed out that the signature and printed name on the document "appeared to have been traced over or otherwise altered." *Id.* Here, in contrast, plaintiff's denial is based solely on her lack of memory of the document. She does not deny that the signature is genuine. That plaintiff does not recall every single document signed in connection with her employment is

not surprising.

Plaintiff also contends that, "even if the purported signature of plaintiff is genuine," she is entitled to relief because she did not understand that by agreeing to arbitration, she was waiving her right to access the courts. Plaintiff relies on California Civil Code section 1577 and *Pacific State Bank v. Greene,* 110 Cal.App.4th 375, 388-390, 1 Cal.Rptr.3d 739 (2003), for the proposition that a mistake as to the nature of the document being signed is grounds for relief.

Plaintiff's unilateral mistake defense lacks merit. "California law allows rescission of contract for unilateral mistake only 'when the unilateral mistake is known to the other contracting party and is encouraged or fostered by that party." *Brookwood v. Bank of Am.,* 45 Cal.App.4th 1667, 1673-74, 53 Cal.Rptr.2d 515 (1996) (citation omitted). In *Brookwood,* the court held that the employee was "bound by the provisions of the [arbitration] agreement regardless of whether [she] read it or [was] aware of the arbitration clause when [she] signed the document." *Id.* at 1674, 53 Cal.Rptr.2d 515 (citing *Macaulay v. Norlander,* 12 Cal.App.4th 1, 6, 15 Cal.Rptr.2d 204 (1992)). "No law requires that parties dealing at arm's length have a duty to explain to each other the terms of a written contract, particularly where, as here, the language of the contract expressly and plainly provides for the arbitration of disputes arising out of the contractual relationship." *Id.*

II. Unconscionability

When deciding whether the parties agreed to arbitrate a certain matter, federal courts "should apply ordinary state-law principles that govern the formation of contracts." *First Options,* 514 U.S. at 944; *Circuit City Stores, Inc., v. Adams,* 279 F.3d 889, 892 (2002). While "courts may not invalidate arbitration agreements under state laws applicable only to arbitration provisions," general contract defenses such as fraud, duress, or unconscionability, grounded in state contract law, may operate to invalidate arbitration agreements." *Circuit City,* 279 F.3d at 982 (quoting *Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996)). Because plaintiff was employed in California, the Court looks to California contract law to determine the validity of the arbitration agreement. *See id.* The relevant California law here requires the Court to determine whether the arbitration clause was unconscionable at the time it was made. *See* Cal. Civ.Code § 1670.5; *Armendariz v. Found. Health Psychare Servs., Inc.,* 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745, 6 P.3d 669 (2000). If it so finds, "the court may refuse to enforce the contract, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." *Id.*

***5** "Unconscionability analysis begins with an inquiry into whether the contract is one of adhesion." *Armendariz,* 24 Cal.4th at 113, 99 Cal.Rptr.2d 745, 6 P.3d 669. If the contract is adhesive, the Court must then determine whether "other factors are present which, under established legal rules ... operate to render it unenforceable"; that is, whether the contract is unconscionable. *Id.* (internal citations and quotations marks omitted). Unconscionability has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one sided results. *Id.* at 114, 99 Cal.Rptr.2d 745, 6 P.3d 669 (quoting *A & M Produce Co. v. FMC Corp.,* 135 Cal.App.3d 473, 486-87, 186 Cal.Rptr. 114 (1982) (internal quotation marks omitted)). Both elements must be present, although not necessarily to the same degree. *Armendariz,* 24 Cal.4th at 114, 99 Cal.Rptr.2d 745, 6 P.3d 669. Courts apply a sliding scale: "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required ... and vice versa." *Id.*

Here, the employment agreement is one of adhesion because it is "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract

or reject it." *Id*. at 113, 99 Cal.Rptr.2d 745, 6 P.3d 669 (defining "adhesion"). Accordingly, the Court must measure the procedural and substantive qualities of the arbitration agreement.

A. Procedural unconscionability

To evaluate procedural unconscionability, the Court must examine how the parties negotiated their contract and "the circumstances of the parties at the time." *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1106 (2003). Courts typically search for signs of surprise and oppression when evaluating procedural unconscionability. *Stirlen v. Supercuts, Inc.*, 51 Cal.App.4th 1519, 1532, 60 Cal.Rptr.2d 138 (1997). Surprise refers to "the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms." *Id.* (internal citations and quotation marks omitted). Oppression springs "from an inequality of bargaining power [that] results in no real negotiation and an absence of meaningful choice." *Id.*

Here, plaintiff has produced evidence showing both surprise and oppression. She states that she does not remember signing the arbitration agreement, and that she does not know what arbitration means. The arbitration clause is also marked page "60" of what appears to have been a very thick packet of documents she was presented in connection with her employment. As for oppression, the unequal bargaining power of the two parties is significant; plaintiff is a maid who does not speak English, and her employer is a company with access to legal counsel.[FN5] There can be no doubt about who is the stronger party: plaintiff's choice was to accept the terms of employment as offered, or not at all.

> FN5. Plaintiff contends she was hired in June 2002, but points out that the arbitration agreement was signed in December 2002. The alleged six month delay in executing the arbitration agreement also raises an inference of both surprise and oppression.

B. Substantive unconscionability

***6** Plaintiff relies on *Armendariz*, 24 Cal.4th 83, 99 Cal.Rptr.2d 745, 6 P.3d 669, and *Circuit City v. Adams*, 279 F.3d 889, to argue that the arbitration agreement is substantively unconscionable because it is "exclusively one-way." Plaintiff reads the clause to require her to submit to binding arbitration if she believes Maid Brigade has violated any of her rights arising out of the employment agreement, but contends that it contains no such restriction on the employer.[FN6]

> FN6. Plaintiff makes three other arguments. First, she contends that the agreement's reference to the American Arbitration Association rules is ambiguous because either the AAA's Labor Arbitration Rules or its Employment Arbitration Rules might apply. The rules themselves resolve any such ambiguity in favor of the AAA's Employment Rules. The Labor Rules apply when reference to the AAA is made "in a collective bargaining agreement." AAA Labor Rules art. 1. Neither party has alleged that a collective bargaining agreement exists here. In contrast, the Employment Rules apply whenever parties provide for arbitration by the AAA "of an employment dispute." AAA Employment Rules art. 1.
>
> Second, plaintiff contends that the unlawful non-compete agreement in the employment packet presented by BMJ creates "a pervasive aura of oppression and unconscionability." Opp'n at 9. Without deciding whether that agreement is void, the Court notes its concern over the non-compete agreement.
>
> Third, plaintiff asserts that the AAA Employment Rules do not confer plaintiff with a right to discovery, and they require her to pay administrative fees ranging from $150 to as much as $6,000. Plaintiff points out that, under *Ar-*

> *mendariz,* a mandatory employment arbitration agreement must meet certain minimum requirements when an employee's statutory civil rights are the subject of the dispute. These include the right to "more than minimal discovery" and the right not to pay fees that wouldn't otherwise be required if the dispute were decided in a court of law. *Armendariz,* 24 Cal.4th at 102, 99 Cal.Rptr.2d 745, 6 P.3d 669. The failure of an arbitration agreement to meet these requirements does not automatically render it unenforceable, however. Instead, the Court may stay litigation on the conditions that the employer consent to discovery, and that the employer cover the employee's share of "all types of costs that are unique to arbitration." *See id.* at 106, 113, 99 Cal.Rptr.2d 745, 6 P.3d 669.

In *Armendariz,* the arbitration clause required only employees to arbitrate their wrongful termination claims against the employer, but did not require the employer to arbitrate claims it may have against the employees. *See Armendariz,* 24 Cal.4th at 115-16, 99 Cal.Rptr.2d 745, 6 P.3d 669. The court held that, "in the context of an arbitration agreement imposed by the employer on the employee, such a one-sided term is unconscionable." The court reasoned, "although parties are free to contract for asymmetrical remedies and arbitration clauses of varying scope ... the doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself." *Id.* at 118, 99 Cal.Rptr.2d 745, 6 P.3d 669. "The substantive one-sidedness of the *Armendariz* agreement was compounded by the fact that it did not allow full recovery of damages for which the employees would be eligible under the FEHA." *Circuit City v. Adams,* 279 F.3d at 893.

The court in *Circuit City v. Adams* found the arbitration agreement at issue there to be "virtually indistinguishable" from the agreement in *Armendariz. Id.* The court found procedural unconscionability because the arbitration agreement was a contract of adhesion was "a prerequisite to employment, and job applicants are not permitted to modify the agreement's terms-they must take the contract or leave it." 279 F.3d at 893. The court also found substantive unconscionability because the agreement created an "asymmetrical arrangement" that was "compounded by the fact that [the arbitration agreement] did not allow full recovery of damages for which the employees would be eligible under the FEHA." *Id.*

BMJ does not deny that the arbitration agreement is one-sided. Instead, BMJ relies on an unreported case, *Gray v. Conseco, Inc.,* 2000 WL 148273 (C.D. Cal 2000), to argue that the Court should "reject the holding" of *Armendariz.* The arbitration clause in *Gray* required the plaintiff borrowers to arbitrate any and all disputes arising out of a loan agreement, while allowing the defendant lender to bring a lawsuit in court for certain types of claims. *Id.* at *4. The *Gray* court declined to follow *Armendariz* because it found that the holding in that case impermissibly "singles out and imposes a special burden on arbitration agreements." *Id.* The *Gray* court, in characterizing the *Armendariz* holding, stated, "the California Supreme Court has held that a one-sided arbitration clause is unconscionable unless there is a valid business justification for the one-sidedness of the clause." *Id.*

*7 To the extent the *Gray* court reads *Armendariz* to hold that a non-mutual arbitration clause is *per se* unconscionable absent a valid business justification, this Court disagrees and finds that the holding of *Armendariz* is not so broad. The California Supreme Court took pains to emphasize that the mere lack of mutuality does not render a contract illusory, but "rather, that in the context of an arbitration agreement *imposed by the employer on the employee,* such a one-sided term is unconscionable." *Armendariz,* 24 Cal.4th at 118, 99

Cal.Rptr.2d 745, 6 P.3d 669 (emphasis added). Rather than focusing merely on the substantive, non-mutual aspect of the arbitration clause, the court was apparently concerned with the procedural unconscionability often found in adhesive arbitration agreements present in employment contracts. The *Armendariz* court stated that parties may contract for an asymmetrical arbitration agreement, but when one is imposed by the stronger party on the weaker party through a contract of adhesion, courts must step in to limit its unconscionable effects.

Furthermore, *Circuit City* refutes the *Gray* court's holding that *Armendariz* "singles out and imposes a special burden on arbitration agreements." *Gray,* 2000 WL 148273 at *4. The Ninth Circuit held that "unconscionability is a defense to contracts and does not single out arbitration agreements for special scrutiny ...." *Circuit City,* 279 F.3d at 895. Because unconscionability is a generally applicable contract defense, the Court's decision does not "run afoul of the FAA by imposing a heightened burden on arbitration agreements." *Id.* (citing *Doctor's Assocs.,* 517 U.S. at 687); *see also Ticknor v. Choice Hotels Intern., Inc.,* 265 F.3d 931, 935 (9th Cir.2001) (the FAA does not preempt state law governing the unconscionability of adhesion contracts).

Moreover, the *Gray* case is factually distinguishable from this case, as well as from *Armendariz* and *Circuit City,* for reasons relating to both substantive and procedural unconscionability. First, the arbitration agreement in *Gray* was not entirely unilateral; both parties were generally obligated to arbitrate "all disputes, claims, or controversies arising from or relating to the contract." An exception was carved out for the lender, who would "retain the option to use judicial or non-judicial relief to enforce [certain rights] relating to the real property secured in a transaction underlying [the] arbitration agreement." 2000 WL 1480273 at *2. Thus, the substantive unconscionability was less severe. Furthermore, the *Gray* plaintiffs "allege [d] little procedural unconscionability other than that the notes are form contracts and they had to sign many papers at once." *Id.* at *4. The court found no other signs of procedural unconscionability. In contrast, in this case as in *Armendariz* and *Circuit City,* the arbitration clause is entirely unilateral and thus more substantively unconscionable. Moreover, the oppression faced by a maid seeking a job from a sophisticated employer with the backing of a national franchiser is far greater than that faced by a homeowner seeking a loan.

***8** The Court is unable to distinguish the one-sided arbitration clause here from the ones in *Armendariz* and *Circuit City.* Because the arbitration agreement here was entirely one-sided and was imposed by a strong employer on a much weaker employee, the Court finds it is unconscionable and therefore unenforceable under California law.

CONCLUSION

For the foregoing reasons, and for cause shown, the Court DENIES defendant BMJ's motion to stay litigation pending arbitration (Docket No. 32).

IT IS SO ORDERED.

N.D.Cal.,2007.
Perez v. Maid Brigade, Inc.
Not Reported in F.Supp.2d, 2007 WL 2990368 (N.D.Cal.)

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Only the Westlaw citation is currently available.

United States District Court,
N.D. California.
Kevin SULLIVAN, an individual and Wholesale Woodfloor Warehouse, a Nevada corporation, Plaintiffs,
v.
LUMBER LIQUIDATORS, INC. a Delaware corporation, Defendant.

No. C–10–1447 MMC.
June 2, 2010.

Thad Alan Davis, Sarah Zenewicz, Ropes & Gray LLP, San Francisco, CA, for Plaintiffs.

Alex Hernaez, Fox Rothschild LLP, San Francisco, CA, Gray Bolling Broughton, Patrick Risdon Hanes , Williams Mullen, Richmond, VA, for Defendants.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS; GRANTING DEFENDANT'S ALTERNATIVE MOTION TO STAY; STAYING ACTION PENDING RESOLUTION OF ARBITRATION; VACATING MAY 28, 2010 HEARING

MAXINE M. CHESNEY, District Judge.

*1 Before the Court is defendant Lumber Liquidators, Inc.'s ("Lumber Liquidators"), Motion to Dismiss or, in the Alternative, to Stay Pending Arbitration, filed April 22, 2010. Plaintiffs Kevin Sullivan ("Sullivan") and Wholesale Woodfloor Warehouse have filed opposition, to which Lumber Liquidators has replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court deems the matter appropriate for determination on the parties' written submissions, hereby VACATES the May 28, 2010 hearing, and rules as follows.

BACKGROUND

This case involves a dispute over a family business. Sullivan's eldest brother, Tom Sullivan, is the founder and chairman of Lumber Liquidators, a publicly traded company with approximately 195 retail stores located throughout the United States. (*See* FAC ¶ 5.) Sullivan was an employee of Lumber Liquidators from 1997 until December 11, 2008. (*See* Declaration of Kevin H. Sullivan ("Sullivan Decl.") ¶ 2.)

In 1998, Sullivan and Lumber Liquidators executed a stock option agreement. (*See* FAC ¶ 8.) A dispute over the terms of the 1998 stock option agreement resulted in a mediation between the parties in 2005. (*See* FAC ¶ 8). The mediation, in turn, resulted in Sullivan and Lumber Liquidators' entering into a Confidential Release and Settlement Agreement ("the Settlement Agreement") on August 1, 2005. (*See id.; see also* Declaration of Farhad Aghdami ("Aghdami Decl.") ¶ 2.) In conjunction with the Settlement Agreement, Sullivan and Lumber Liquidators also entered into (1) an Employment, Confidentiality, and Non–Competition Agreement (the "Employment Agreement") (*see* Declaration of E. Livingston B. Haskell, filed April 22, 2010, ("Haskell Decl.") ¶ 3, Ex. 1A) and (2) a Stock Option Agreement (the "Option Agreement") (*see* Haskell Decl. ¶ 3, Ex. 1B). The Settlement Agreement, the Employment Agreement, and the Option Agreement all contain choice-of-law provisions, selecting the law of the Commonwealth of Massachusetts, and provide for arbitration in Boston, Massachusetts. (*See* Haskell Decl. ¶ 5, Ex. 1 ¶¶ 9, 10; *id.* Ex. 1A ¶ 18, Ex. 1B ¶ 17.)

The Employment Agreement prohibits Sullivan from (1) competing directly with Lumber Liquidators for a period of two years following the end of his employment with Lumber Liquidators (*see* Haskell Decl. Ex. 1A ¶ 7), (2) inducing Lumber Liquidators' employees to terminate their relationships with Lumber Liquidators (*see* Haskell Decl. Ex. 1A ¶ 6(b)), and (3) using, disclosing, or copying confidential information (*see* Haskell Decl. Ex. 1A ¶ 8). Additionally, the Employment Agreement

contains an express provision ("the Arbitration Provision") that all disputes "arising out of or concerning the interpretation or application of" said Agreement "shall be resolved timely and exclusively by final and binding arbitration." (*See* Haskel Decl. Ex. 1A ¶ 18.) Sullivan was represented by his own counsel for the mediation as well as the negotiation and execution of the Settlement Agreement, the Employment Agreement, and the Option Agreement. (*See* Affidavit of E. Livingston B. Haskell, filed May 14, 2010 ("Haskell Aff.") ¶ 5; *see also* Aghdami Decl. ¶¶ 6–11, Exs. 1, 2.)

***2** In December 2007, after Lumber Liquidators' initial public offering of its stock, Sullivan demanded arbitration with Lumber Liquidators in Boston, Massachusetts, over a dispute regarding the amount of compensation he was due under the Option Agreement. (*See* Haskell Aff. ¶ 7.) In 2008, Sullivan filed a civil lawsuit against Lumber Liquidators and several of its executives in Massachusetts Superior Court. (*See* Haskell Aff. ¶ 8.) The substance of Sullivan's civil suit was later added to the arbitration. (*See id.*) At the conclusion of the arbitration, the arbitrator awarded Sullivan an after-tax total of 529,027 shares of Lumber Liquidators stock, which shares are currently worth over $15 million. (*See* Haskell Aff. ¶ 9.)

On December 11, 2008, Lumber Liquidators terminated Sullivan's employment. (*See* Declaration of Robert Morrison ("Morrison Decl.") ¶¶ 13–15.) On the day of his termination, Sullivan refused to return his company-issued laptop. (*See* Morrison Decl. ¶¶ 16–21.) According to Lumber Liquidators, Sullivan later returned the laptop but copied its contents before doing so. (*See* Morrison Decl. ¶ 23.) Thereafter, on January 20, 2009, Sullivan founded a retail flooring business known as Wholesale Woodfloor Warehouse, which directly competes with Lumber Liquidators. (*See* Sullivan Decl. ¶ 7, Exs. B, C). Wholesale Woodfloor Warehouse is a Nevada Corporation that presently operates retail stores in Long Beach and Sacramento, California. (*See* FAC ¶ 3 .)

On March 5, 2010, Lumber Liquidators filed an arbitration demand with the American Arbitration Association ("AAA"), seeking damages for alleged breach of the Employment Agreement based on the above-referenced actions on the part of Sullivan ("the Arbitration"). (*See* Sullivan Decl. ¶ 9; *see also* Haskell Decl. Ex. 4.) Thereafter, on March 15, 2010, Lumber Liquidators filed a civil action in Massachusetts Superior Court, seeking interim relief pending resolution of the Arbitration. (*See* Sullivan Decl. ¶ 10, Ex. E; *see also* Haskell Decl. Ex. 6.) On April 1, 2010, Sullivan filed in California, in San Francisco Superior Court, a complaint for injunctive relief, seeking to enjoin Lumber Liquidators from enforcing the non-competition clause contained in the Employment Agreement, and, on April 5, 2010, a First Amended Complaint ("FAC") was filed, adding Sullivan's corporation, Wholesale Woodfloor Warehouse, as a party plaintiff to said action. (*See* Declaration of E. Livingston B. Haskell in Support of Removal, filed April 6, 2010, Ex. A.) On April 6, 2010, Lumber Liquidators removed the action to federal district court on the basis of diversity jurisdiction, pursuant to 28 U.S.C. § 1332. (*See id.*)

LEGAL STANDARD

Under the Federal Arbitration Act ("FAA"), arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *See* 9 U.S.C. § 2. The FAA "not only placed arbitration agreements on equal footing with other contracts, but established a federal policy in favor of arbitration." *See Circuit City Stores, Inc. v. Adams,* 279 F.3d 889, 892 (9th Cir.2002).

***3** In determining the validity of an arbitration agreement, federal courts " 'apply ordinary state-law principles that govern the formation of contracts.' " *See id.* at 892 (quoting *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)). Thus, "general contract defenses such as fraud, duress, or unconscionability, grounded in state contract law,

may operate to invalidate arbitration agreements." *Circuit City,* 279 F.3d at 892.

DISCUSSION

Sullivan does not dispute that he is a party to the Employment Agreement or that his claims fall within the scope of the Arbitration Provision contained therein. Rather, Sullivan argues, the Arbitration Provision is unenforceable. Specifically, Sullivan argues that the choice-of-law provision contained in the Employment Agreement is, by its terms, applicable only in the context of an arbitration or, at best, is ambiguous in that respect, and that even if the choice-of-law provision is deemed applicable to the entire agreement, California law applies to the instant action and the Arbitration Provision is unenforceable under California law as unconscionable and in violation of California public policy. Lumber Liquidators, by contrast, argues that Massachusetts law governs the Employment Agreement in its entirety and that, in any event, the Arbitration Provision is enforceable under California law. FN1

FN1. Sullivan makes no argument that the Arbitration Provision would be considered unconscionable or otherwise unenforceable under Massachusetts law.

As discussed below, even assuming California law applies, Sullivan fails to show the Arbitration Provision is unconscionable or otherwise unenforceable thereunder.

A. Unconscionability

"California law, like federal law, favors enforcement of valid arbitration agreements." *See Armendariz v. Found. Health Psychcare Servs., Inc.,* 24 Cal.4th 83, 97, 99 Cal.Rptr.2d 745, 6 P.3d 669 (2000). "[U]nder both federal and California law, arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the [rescission] of any contract." *See id.* at 98 & n. 4, 99 Cal.Rptr.2d 745, 6 P.3d 669

A party moving for arbitration "bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and a party opposing the [motion] bears the burden of proving by a preponderance of the evidence any fact necessary to its defense." *See Bruni v. Didion,* 160 Cal.App.4th 1272, 1282, 73 Cal.Rptr.3d 395 (2008) (internal quotation and citation omitted). Unconscionability is one of several grounds upon which a contract, including a contract to arbitrate, may be found unenforceable. *See* Cal. Civ.Code § 1670.5(a); *see also Szetela v. Discover Bank,* 97 Cal.App.4th 1094, 1099, 118 Cal.Rptr.2d 862 (2002). Consequently, the party opposing arbitration has the burden of proving the arbitration provision is unconscionable. *See id.*

Unconscionability includes both a "procedural" and a "substantive" element. *See Armendariz,* 24 Cal.4th at 114, 99 Cal.Rptr.2d 745, 6 P.3d 669. The focus of the procedural element is on "oppression" or "surprise." *See id.* " 'Oppression' arises from an inequality of bargaining power which results in no real negotiation and 'an absence of meaningful choice.' " *A & M Produce Co. v. F.M.C. Corp.,* 135 Cal.App.3d 473, 486, 186 Cal.Rptr. 114 (1982) (internal quotation and citation omitted). " 'Surprise' involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them." *Id.* "The procedural element of an unconscionable contract generally takes the form of a contract of adhesion." *See Discover Bank v. Superior Court of L.A.,* 36 Cal.4th 148, 160, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005). Substantive unconscionability focuses on whether the contract or provision thereof leads to "overly harsh" or "one-sided" results. *See Armendariz,* 24 Cal.4th at 114, 99 Cal.Rptr.2d 745, 6 P.3d 669. To be unenforceable, a contract must be both procedurally and substantively unconscionable. *See id.*

***4** California courts apply a "sliding scale" analysis in making determinations of unconscionability: "the more substantively oppressive the con-

tract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *See Davis v. O'Melveny & Myers,* 485 F.3d 1066, 1072 (9th Cir.2007) (quoting *Armendariz,* 24 Cal.4th at 99, 99 Cal.Rptr.2d 745, 6 P.3d 669). Thus, although both procedural and substantive unconscionability must be present for the contract to be declared unenforceable, they need not be present to the same degree. *See Harper v. Ultimo,* 113 Cal.App.4th 1402, 7 Cal.Rptr.3d 418 (2003).

The validity of an arbitration clause, absent an express agreement "clearly and unmistakably" reserving such issue for the arbitrator, is a question of law to be resolved by the court. *See Howsam v. Dean Whitter Reynolds, Inc.,* 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002); *Bruni,* 160 Cal.App.4th at 1283, 1286–88, 73 Cal.Rptr.3d 395. Here, neither party has identified such an agreement. Accordingly, the Court next turns to the question of unconscionability. In determining that issue, the Court "sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination." *See id.* (citing *Engalla v. Permanente Medical Group, Inc.,* 15 Cal.4th 951, 972, 64 Cal.Rptr.2d 843, 938 P.2d 903 (1997).

1. Procedural Unconscionability

Sullivan argues the Arbitration Provision of the Employment Agreement is procedurally unconscionable (1) because Sullivan was required by Lumber Liquidators to execute the agreement "as a condition of continued employment and to receive deferred compensation" (*see* Pl.'s Opp'n at 9:15–22) and (2) because the Arbitration Provision "incorporates by reference the National Rules for the Resolution of Employment Disputes of the American Arbitration Association ("AAA Rules") and fails to attach the rules for Sullivan's review, or to specify which version of the rules will apply." (*See* Pl.'s Opp'n at 9:14–10:2). The Court finds Sullivan's arguments unpersuasive.

First, Sullivan fails to aver or otherwise offer evidence to demonstrate he had no opportunity to negotiate the terms of the Arbitration Provision. Rather, he states he "did not negotiat[e] the terms of the arbitration clause in paragraph 18." (*See* Sullivan Decl. ¶ 6.) Such statement is, at best, ambiguous, particularly in light of the uncontroverted evidence that Sullivan was represented by counsel in the negotiation and execution of all three of the related agreements. (*See* Haskell Aff. ¶ 5; Aghdami Decl ¶ 6.) Indeed, Lumber Liquidators has offered evidence that Sullivan's counsel "drafted portions of the Employment Agreement on Sullivan's behalf [and] made comments and negotiated changes to the Employment Agreement on Sullivan's behalf." (*See* Aghdami Decl. ¶¶ 7–10, Exs. 1, 2). Sullivan has submitted no evidence in contradiction thereof.

***5** Moreover, even if Lumber Liquidators insisted on inclusion of the Arbitration Provision, the taking of such position under the circumstances pertaining, namely, in the course of negotiations over a global resolution of the parties' disputes concerning their past and continuing relationship, would not serve to render such provision unconscionable or otherwise unenforceable under California law. Clearly, neither the Employment Agreement nor any provision therein constitutes a contract of adhesion. *See Circuit City Stores v. Adams,* 279 F.3d 889, 893 (2002) (defining contract of adhesion, under California law, as "standard-form contract, drafted by the party with superior bargaining power, which relegates to the other party the option of either adhering to its terms without modification or rejecting the contract entirely"); *see, e.g., Szetela,* 97 Cal.App.4th at 1100, 118 Cal.Rptr.2d 862 (finding arbitration clause contained in amendment to cardholder agreement constituted procedurally unconscionable "bill stuffer"). Sullivan cites to no authority in which a party's insistence on the inclusion of any particular term in a negotiated agreement, whether such term concerns arbitration or otherwise, has resulted in a finding of procedural unconscionability. *Cf. Pokorny v. Quixtar,* 601 F.3d 987, 991, 997 (9th Cir.2010)

(upholding finding of procedural unconscionability where form "registration agreement" contained form arbitration clause; citing prior authority finding "standardized contract" unconscionable).

Sullivan's argument that the Arbitration Provision is procedurally unconscionable because it "merely incorporates by reference" the AAA Rules (*see* Pl.'s Opp'n at 9:7–13) likewise finds no support in the authority on which Sullivan relies, in this instance, *Harper v. Ultimo,* 113 Cal.App.4th 1402, 1406–07, 7 Cal.Rptr.3d 418 (2003). As Lumber Liquidators points out, the rules at issue in *Harper* not only were incorporated by reference but also limited the substantive remedies available to the plaintiffs therein, precluding those plaintiffs from "obtaining tort damages, punitive damages, or any other damages otherwise appropriate in a court of law." *See id.* at 1405, 7 Cal.Rptr.3d 418. Here, by contrast, Sullivan has made no showing that the AAA Rules referenced by the Employment Agreement limit his available remedies or otherwise restrict the scope of his claims. Nor, as distinguished from *Harper,* is there any element of surprise. *See id.* at 1405–06, 7 Cal.Rptr.3d 418 (noting where customer given "preprinted" contract providing that controversies thereunder were to be settled in accordance with Better Business Bureau Arbitration Rules, "customer must inevitably receive a nasty shock when he or she discovers that no relief is available even if out and out fraud has been perpetrated"); *see also Sullenberger v. Titan Health Corp.,* 2009 WL 1444210, at *8 (E.D.Cal.2009) (rejecting argument that arbitration agreement was procedurally unconscionable because it "provide[d] that the rules of the American Arbitration Association [would] govern, but [did] not provide a copy of those rules"; noting "plaintiff ha[d] not shown that the [AAA rules], referenced in the arbitration agreement, contain provisions that are unfair or inequitable").

***6** Nor is the Court persuaded by Sullivan's argument that the Arbitration Provision is unenforceable because it does not specify whether the AAA Rules to be applied are to be those in effect at the time of execution or those in effect at the time of any claimed breach. Although the *Harper* court did find the unfairness resulting from the above-referenced "artfully hidden" limitation on relief was compounded by the potential that the Better Business Bureau's rules might change, the Ninth Circuit, in so finding, observed that those rules were "not just *procedural* ones" but, rather, had "the effect of *substantively* limiting the defendant's exposure." *See id.* at 1406–07, 7 Cal.Rptr.3d 418 (emphases in original).

Lastly, Sullivan's argument that the Arbitration Provision is procedurally unconscionable because "there was [no] clear communication" that opting out of the Arbitration Provision "would have no effect on his employment relationship" (*see* Pl.'s Opp'n at 9:20–22) fares no better. The case on which Sullivan appears to rely for such proposition, *Circuit City Stores, Inc. v. Najd,* 294 F.3d 1104 (9th Cir.2002), is distinguishable, as the contract at issue therein was not negotiated. *See id.* at 1106 (noting employer "distributed packet of materials to the stores employees which included a Dispute Resolution Agreement" containing arbitration clause).

2. Substantive Unconscionability

Sullivan offers no evidence of any overly-harsh or one-sided result arising from the enforcement of the Arbitration Provision. Instead, Sullivan argues that the Arbitration Provision fails to comply with certain requirements established by the California Supreme Court in *Armendariz. See Armendariz,* 24 Cal.4th at 102, 99 Cal.Rptr.2d 745, 6 P.3d 669 . FN2 Sullivan's reliance on such authority is unavailing, however, as *Armendariz* concerned the arbitration of nonwaivable "statutory civil rights." *See id.* As discussed therein, when a plaintiff seeks to vindicate nonwaivable statutory rights, such as those created by such anti-discrimination statutes as California's Fair Employment and Housing Act ("FEHA"), the above-referenced requirements serve to ensure that those rights and protections are not dissipated by the lack of a judicial forum. *See id.*

(noting "beneficiaries of public statutes are entitled to the rights and protections provided by law") (internal quotation and citation omitted); *see also Mercuro v. Superior Court,* 96 Cal.App.4th 167, 179, 116 Cal.Rptr.2d 671 (2002) (applying *Armendariz* requirements to arbitration of claims brought under California Labor Code §§ 230.8 and 970). Sullivan cites to no authority holding such requirements are more broadly applicable. Moreover, as set forth below, not only has Sullivan failed to provide legal authority in support of his argument, two of the three factual underpinnings thereof find no support in the instant record.

> FN2. As set forth in *Armendariz,* in accordance with the "basic principle of nonwaivability of statutory civil rights," an arbitration agreement applicable to a statutory claim of such nature "is lawful if it (1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum." *See id.* (quoting *Cole v. Burns Intern. Security Services,* 105 F.3d 1465 (D.C.Cir.1997).

Sullivan argues the Arbitration Provision (1) "does not require a written award," (2) "does not provide for all types of relief that would otherwise be available in court," and (3) "requires [Sullivan] to 'share equally all costs of arbitration.' " (*See* Pl.'s Opp'n at 10:21–24.) In that regard, the Court first notes that Sullivan, in support of his first two assertions, neither provides nor cites to any part of the AAA Rules in effect either in 2005 [FN3] or at present. Moreover, the relevant AAA rules, available for judicial notice, require that the arbitrator's award be in writing. *See* AAA National Rules for the Resolution of Employment Disputes, effective January 1, 2004 ("2004 Rules"), Rule 34.c, *available at* http://www.adr.org/sp.asp? id=26405, 99 Cal.Rptr.2d 745, 6 P.3d 669# n34 (providing "[t]he award shall be in writing"); AAA Employment Arbitration Rules and Mediation Procedures, effective November 1, 2009 ("2009 Rules"), Rule 39.d, *available at* http://www.adr.org/sp.asp? id=32904# 39, 99 Cal.Rptr.2d 745, 6 P.3d 669, (providing "[t]he award shall be in writing"). Next, Sullivan offers no evidence to support his assertion that the AAA Rules either did not or currently do not provide for all types of relief that otherwise would be available in district court. Indeed, to the contrary, the relevant AAA rules provide for all relief available under the law. *See* 2004 Rules, Rule 34.d (providing "[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable, including any remedy or relief that would have been available to the parties had the matter been heard in court"); 2009 Rules, Rule 39.d (providing "[t]he arbitrator may grant any remedy or relief that would have been available to the parties had the matter been heard in court including awards of attorney's fees and costs, in accordance with applicable law"). Lastly, although the Arbitration Provision requires the parties to "share equally in all costs of arbitration" (*see* Haskell Decl. Ex. 1A at ¶ 18), Sullivan offers no argument or evidence indicating how such provision would be substantively unconscionable under the circumstances pertaining. *See Armendariz,* 24 Cal.4th at 102, 99 Cal.Rptr.2d 745, 6 P.3d 669 (precluding enforcement of arbitration agreement where employee required to pay "unreasonable costs").

> FN3. As noted, the Employment Agreement was executed in August 2005.

3. Conclusion as to Unconscionability

*7 Accordingly, for the reasons stated above, Sullivan has failed to show the Arbitration Provision in the Employment Agreement is unenforceable as unconscionable.

B. Waiver

Sullivan next argues the Arbitration Provision is unenforceable because Lumber Liquidators has

waived its right to arbitration.

"[W]here a contract provides that arbitration may be demanded within a stated time, failure to make demand within that time constitutes a waiver of the right to arbitrate." *See Platt Pacific, Inc. v. Andelson,* 6 Cal. –4th 307, 313 (1993) (denying motion to compel; finding plaintiff had waived right to arbitration by failing to timely demand arbitration pursuant to terms of arbitration agreement).

Here, Sullivan argues Lumber Liquidators has waived its right to arbitration by not making its demand for arbitration "within thirty days of the events alleged." (*See* Pl.'s Opp'n at 13:7–9.) Sullivan's argument is unpersuasive. As Lumber Liquidators points out, the Arbitration Provision does not require Lumber Liquidators to make a demand for arbitration within thirty days of the events giving rise to Lumber Liquidators' claims, but, rather, requires Lumber Liquidators to make such demand within thirty days of the parties' failure to resolve their dispute through mediation. (*See* Haskell Decl. Ex. 1A at ¶ 18.)

Specifically, the Arbitration Provision states, in relevant part:

> Prior to arbitration of any dispute, the parties agree to attempt to settle the dispute with the assistance of a mutually agreed upon mediator. *If* the parties cannot resolve the dispute through mediation, *then* arbitration must be demanded within 30 calendar days or the time when the demanding party knows or should have known of the event or events giving rise to the claim.
>
> (*See id.*) (emphasis added).

The Arbitration Provision thus makes clear that attempted mediation of a known dispute is a condition precedent to starting the thirty-day clock for filing a demand for arbitration. Sullivan makes no showing that Lumber Liquidators' demand for arbitration was made more than thirty calendar days after the parties' failure to resolve their dispute through mediation.

Accordingly, Sullivan has failed to show Lumber Liquidators waived its right to arbitration under the Employment Agreement.

C. Available Relief

Lumber Liquidators seeks an order of dismissal on the ground that "the same issues ... are already before the AAA and the state court" in Massachusetts. (*See* Def.'s Reply at 9:9–13; *see also* Haskell Decl. Ex. 6.) In particular, Lumber Liquidators, relying on the Declaratory Judgment Act, 28 U.S.C. § 2201, and *Brillhart v. Excess Ins. Co. of America,* 316 U.S. 491, 495, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942), argues, the Court has discretion both to abstain from exercising jurisdiction over and to dismiss the instant action in its entirety. *See id.* at 494–95 (recognizing district court's discretion as to whether to exercise jurisdiction under Declaratory Judgment Act; setting forth relevant considerations and noting "[g]ratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided").

***8** Lumber Liquidators' reliance on the above-referenced authority is misplaced, as Sullivan, by the instant action, seeks not only declaratory relief but also an award of monetary damages. (*See* FAC at 8:12–14.) Neither the Declaratory Judgment Act nor *Brillhart* encompasses claims of such nature. *See Brillhart,* 316 U.S. at 493, 495 (describing suit therein as one for "declaratory judgment"; noting federal court ordinarily should not "proceed in a declaratory judgment suit" where parties litigating same state law issues in state court); *see, e.g., Burlington Ins. Co. v. Devdhara,* 2009 WL 2901624, at *4 (N.D.Cal.2009) (declining to abstain under *Brillhart* where plaintiffs brought damages claims; noting *Brillhart* "only applies to pure declaratory judgment actions"). Rather, "federal courts may stay actions for damages based on abstention principles, but those principles do not support the outright dismissal or remand of damages actions." *See Quakenbush v. Allstate Ins. Co.,* 517 U.S. 706, 707, 116

S.Ct. 1712, 135 L.Ed.2d 1 (1996).

Accordingly, the Court declines to dismiss the FAC and will stay the proceedings pending resolution of the Arbitration in the Commonwealth of Massachusetts.

CONCLUSION

For the reasons stated, defendant's motion is hereby GRANTED in part and DENIED in part as follows:

1. To the extent Lumber Liquidators seeks an order dismissing the instant action, the motion is DENIED.

2. To the extent Lumber Liquidators seeks in the alternative an order staying the instant action, the motion is GRANTED and the above-titled action is hereby stayed pending resolution of the above-referenced Arbitration;

3. The parties are directed to file a Joint Status Report no later than December 3, 2010 and every six months thereafter, apprising the Court as to the status of the proceedings in the Massachusetts litigation.

IT IS SO ORDERED.

N.D.Cal.,2010.
Sullivan v. Lumber Liquidators, Inc.
Not Reported in F.Supp.2d, 2010 WL 2231781 (N.D.Cal.), 30 IER Cases 1709

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NO. 42747-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MHN GOVERNMENT SERVICES, INC.; HEALTH NET, INC., and MHN SERVICES dba MHN SERVICES CORPORATION, a Washington corporation,
Appellants,

v.

BARBARA BROWN and CINDY HIETT,
Respondents.

CERTIFICATE OF SERVICE

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ORIGINALS

I, Lorraine Carpenito, do hereby certify and declare under penalty of perjury under the laws of the State of Washington as follows:

That I am an employee of Orrick, Herrington & Sutcliffe LLP, 400 Capitol Mall, Suite 3000, Sacramento, California 95814-4497. On March 12, 2012, I caused the Brief of Appellants and this Certificate of Service to be mailed to the Clerk of the Court via US Mail and also to be served via electronic delivery on the parties below:

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Dated this 12th day of March 2012, at Sacramento, California.

Lorraine Carpenito